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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 302

FELT AND TARRANT MANUFACTURING CO.,
APPELLANT,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

FILED AUGUST 26, 1938.

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INDEX.

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[fols. 1-2] Citation in usual form, showing service on Walter L. Bowers, filed July 1, 1938, omitted in printing.

[fol. 3]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

Equity. No. 1284-J

FELT AND TARRANT MANUFACTURING CO., a Corporation, Plaintiff,

v.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, Ray L. Edgar, and Harry B. Riley, as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, and U. S. Webb, the Attorney General of the State of California, Defendants

Action to Enjoin Collection of Taxes Under California Use Tax Act of 1935

BILL OF COMPLAINT—Filed November 12, 1937

To the Honorable the District Court of the United States, in and for the Southern District of California, Central Division:

Felt and Tarrant Manufacturing Co., a corporation, presents this, its verified bill of complaint, against the defendants above named and designated, and for cause of action complains and alleges as follows:

I

Parties

(a) Plaintiff is, and at all times hereinafter mentioned, has been a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen and resident of the said State. Plaintiff is engaged in the business of manufacturing and selling comptometers.

(b) The defendant, John C. Corbett, is a citizen and resident of the State of California residing in San Francisco in said State; the defendant, Fred E. Stewart, is a citizen and resident of the State of California, residing in the City of Oakland in said State; the defendant, Richard E. Collins, is a citizen and resident of the State of California, residing in the City of Redding in said State; the defendant, Ray L. Edgar, is a citizen and resident of the State of California, residing in the City of San Diego in said State; and the defendant, Harry B. Riley, is a citizen and resident of the State of California, residing in the City of Long Beach in said State and said persons constitute the State Board of Equalization of the State of California.

[fol. 4] (c) At all times hereinafter mentioned the defendant, State Board of Equalization of the State of California, was and now is, an official board, organized and existing under and by virtue of the Constitution and laws of the State of California, consisting of the persons named and described in the foregoing paragraph, with the Controller of the State, Harry B. Riley, acting as an ex-officio member thereof.

(d) The defendant, U. S. Webb, is a citizen and resident of the State of California, residing in the City of San Francisco, and is the duly elected, qualified and acting Attorney General of the State of California.

II

Jurisdiction

The grounds upon which the jurisdiction of this Court depends are as follows:

(a) This suit is one of a civil nature, in equity, between citizens of different states.

(b) The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000: to wit, an alleged debt claimed to be owed to the State of California and payable to the said State Board of Equalization in a sum of money amounting to $5,338.68, and also sums of money which will continue to accrue in the future under the provisions of the taxing act complained of in this action and the claims of the defendants hereunder.

(c) This suit arises under the Constitution and laws of the United States in that plaintiff seeks herein, pursuant to Subsection 14 of Section 41, Title 28 of the U. S. Code, to restrain and enjoin the enforcement of that certain statute of the State of California, hereinafter described, known as the Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, to the extent that such statute imposes on plaintiff, in addition to other great and onerous burdens hereinafter more fully related, the duty of collecting from all persons who purchase plaintiff's product from plaintiff, in interstate commerce, for storage, use or other consumption in the State of California, a tax equal to three per cent of the sales price of such product, and to the extent that such statute makes plaintiff personally liable to the State of California for the amount of the tax so required [fol. 5] to be collected by it, and subjects plaintiff to a penalty of ten per cent of the amount of such tax and to the payment of interest thereon if plaintiff fails to remit such tax to the State Board of Equalization on or before the 15th day of the month next succeeding the quarter in which the sale was made, for the reason that such requirements of the statute, according to the particulars hereinafter related, constitute a regulation of and a direct burden upon plaintiff's interstate commerce contrary to and in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States; and for the further reason that such requirements of the statute deprive plaintiff of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(d) The enforcement of collection of the amount now claimed to be due and owing from plaintiff under said statute, and the continued enforcement of said statute in the particulars complained of will, unless restrained, cause plaintiff to suffer great and irreparable damage and injury in the manner and form more particularly hereinafter related.

(e) By reason of the penalty provisions of the said statute plaintiff cannot safely disregard the demand of defendant State Board of Equalization of the State of California for payment of the amount now claimed to be due and owing, and await suit for the collection of such amount because of the penalties which would accrue with respect to such amount and other amounts which would hereafter become

due; and the purported remedy prescribed by the statute of payment of such amount under protest and the bringing of suit to recover the same, being the only remedy allowed to the plaintiff under the terms of said act, would not and does not provide a prompt, speedy and adequate remedy at law because the purported remedy prescribed and directed in said statute is not a plain and certain remedy, is not a prompt and complete remedy, would not result in compensating plaintiff in full for all of the damages, losses and expenses which would be suffered by it, and would result in a multiplicity of actions in manner and form more particularly hereinafter related.

(f) In addition to the foregoing general statement as to the grounds upon which the jurisdiction of this court depends, the facts, circumstances and conditions hereinafter set forth in this bill of complaint, justify and necessitate the exercise of equity jurisdiction of this court, and the granting to the plaintiff of the relief herein sought, including re- [fol. 6] lief by temporary restraining order, interlocutory and final injunction.

III

Description of Plaintiff's Method of Doing Business

Plaintiff is engaged in the business of manufacturing and selling comptometers. Its factory and principal office are both located in the City of Chicago, State of Illinois. Sales of plaintiff's product are made to purchasers in every state in the United States.

All of plaintiff's sales to resident- of the State of California are made on orders solicited in this State by or under the direction of either John M. Flowers or James P. Warren, the former having the exclusive right to solicit orders for plaintiff's goods in the territory south of Santa Barbara, and the latter having the exclusive right to solicit orders in the territory north of Santa Barbara. Attached hereto as "Exhibit A" and made a part hereof by reference is a copy of the "General Agent's Contract" between plaintiff and the aforesaid John M. Flowers; the terms of the contract between plaintiff and the aforesaid James P. Warren are identical with the terms of this exhibit in all essential respects.

Neither of the aforesaid general agents receives a salary from the plaintiff, his sole compensation for soliciting orders

for plaintiff's machines being commissions paid by plaintiff on sales made pursuant to orders solicited by him or his sub-agents hereinafter referred to.

Each of the aforesaid general agents employs sub-agents who also solicit orders for plaintiff's machines; these sub-agents receive salaries and commissions from the general agent by whom they are employed, but they receive no compensation of any kind from plaintiff. Plaintiff, however, reimburses each general agent in an amount not in excess of sixty dollars ($60.00) per month per man for advances made by such general agent to his sub-agents.

There is no contractual relation between plaintiff and the sub-agents, or any of them.

Each of the aforesaid general agents maintains an office in this State for the convenience of himself and his employees, the rent for such offices is paid by plaintiff and plaintiff is named as lessee in the leases therefor. All ex-[fol. 7] penses of maintaining these offices, other than the rent thereof, is paid by the general agents who maintain them.

Each order for plaintiff's machines which is secured by one of the aforesaid general agents or sub-agents is forwarded to plaintiff's Chicago office where, if it meets with the approval of plaintiff's officers, it is accepted and turned over to plaintiff's shipping department for filling. The shipping department appropriates a machine to the order and the number of the machine so appropriated is marked on the accepted order; thereafter a memorandum is sent to the general agent by whom the order was secured, the said memorandum setting forth the number of the machine sold, the model, number of columns, purpose, date of shipment and the name of the purchaser.

All machines sold for delivery in the State of California are shipped either from the Chicago office or from one of plaintiff's other distributing points outside of this State. In some instances the machines are shipped directly to the customers, while in other instances, in order to secure reduced freight rates, large groups of machines are shipped to the general agents who make delivery to the various purchasers. In those instances in which shipment and delivery are made in the manner last stated, each machine in the group is tagged with the purchaser's name before shipment is started.

Approximately seven days after a machine is shipped from Chicago a bill therefor is sent from plaintiff's office in Chicago directly to the purchaser and the purchaser is instructed to make payment directly to plaintiff in Chicago.

Neither the general agents nor their sub-agents have any authority to make a direct sale of plaintiff's machines, or to enter into a contract binding plaintiff to sell one of its machines, or to render a bill for a machine, or to accept payment for a machine.

Plaintiff keeps no machines in California for purposes of sale, its only machines in this State being the "demonstrators" which are used by the general agents and their sub-agents in soliciting orders. These demonstrators are never sold, nor are they appropriated to accepted orders for sales to California residents.

During the entire period from July 1, 1935 to the present date all sales of plaintiff's machines to purchasers for [fol. 8] storage, use or other consumption in the State of California have been made in the manner above stated.

Plaintiff has never qualified to do intrastate business in the State of California, nor has it ever engaged in intrastate business in this State.

IV

Pertinent Provisions of the Statute

The taxing act under which the tax complained of herein is claimed to arise, is an act of the State of California entitled:

"An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately."

Said act, Chapter 361 Statutes of 1935, was approved by the Governor of the State of California, June 20, 1935, and since said date has been and now is in full force and effect.

For the convenience of the Court a summary of the provisions pertinent to this complaint is hereafter set forth

and a full true and complete copy of the said act is attached hereto and marked "Exhibit B".

Section 5. Every retailer selling tangible personal property for storage, use or other consumption in this State must, within thirty days after the effective date of the Act:

(a) Register with the State Board of Equalization;

(b) Give the names and addresses of all agents operating in this State;

(c) Give the location of any and all distribution or sales houses or offices or other places of business within this State; and

(d) Give such other information as the State Board of Equalization may require.

The said Section 5 draws no distinction between retailers engaged in intrastate commerce and those engaged in purely interstate commerce.

Section 6. Every retailer maintaining a place of business in this State and making sales of non-exempted tangible personal property for storage, use or other consumption in [fol. 9] this State must, at the time of making such sales, or when the storage, use or other consumption of the property becomes taxable, collect the tax imposed by the Act from the purchaser and give the said purchaser a receipt therefor in the manner and form prescribed by the State Board of Equalization. The tax thus required to be collected from the purchaser constitutes a debt owed by the retailer to the State.

Section 7. Every retailer maintaining a place of business in this State must, on or before the fifteenth day of the month following the close of each quarterly period, file with the State Board of Equalization a return for such quarterly period, in such form as may be prescribed by the said Board, showing the total sales price of the tangible personal property subject to the tax imposed by the Act which was sold by such retailer during such quarterly period and giving such other information as the Board may require. The return must be accompanied by a remittance of the tax required to be collected by the retailer from its purchasers during the period covered by the return. The

Board may, if it deems it necessary to do so, require returns and remittances to be made for other than quarterly periods.

Section 8. Any retailer failing to pay to the State within the time required by the Act any amount of tax (other than an amount subsequently determined by the Board to be due) which such retailer is required to collect from the purchaser and pay over to the State, must pay, in addition to the amount so required to be collected, a penalty of ten per cent thereof plus interest at the rate of one-half of one per cent per month from the date when such amount became due and payable under the Act.

Section 10. If any retailer neglects or refuses to make a return required by the Act, the Board is directed to make an estimate of the total sales price of tangible personal property subject to the tax sold by the retailer during the period for which no return was filed, and, upon the basis of such estimate, to determine the amount of tax which the retailer should have collected from its purchasers and should have paid over to the State; and the Board is further directed to add to the amount of tax so determined a penalty of ten per cent of the amount thereof. Both the principal and the penalty so determined bear interest at the [fol. 10] rate of one half of one per cent per month from the fifteenth day of the month following the close of the period for which the return was due.

Section 14. The State Board of Equalization, if it deems it necessary to insure compliance with the provisions of the Act, may require any retailer to deposit with it such security as the said Board may determine, and such security may be sold by the Board at public auction if the retailer fails to pay to the State any amount required to be collected from its purchasers, or any interest or penalty due.

Section 21. Every retailer must keep such records, receipts, invoices, and other papers in such form as the State Board of Equalization may require, and the said Board or any person authorized in writing by it, is authorized to examine the books, papers, records and equipment of any retailer required to collect the tax imposed by the Act and to investigate the character of the business of such retailer in order to verify the accuracy of a return made, or if no

return has been made by such retailer, to ascertain the amount required to be collected by the Act.

Section 26. Any retailer who fails or refuses to furnish any return required by the Act, or who fails or refuses to furnish a supplemental return or other data required by the State Board of Equalization, is guilty of a misdemeanor and subject to a fine of not exceeding $500 for each offense.

Section 27. Any violation of the provisions of the Act, except as otherwise therein provided, is a misdemeanor and punishable as such.

Collection Procedure; Lien of Tax

"Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or [fol. 11] other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled. 'Special Judgments For State Retail Sales or Use Tax.'

"An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount herein required to be paid, together with interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer or other person liable for the tax, interest or penalty in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon request of the board

in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

"If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

"In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

"At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together

with any interest or penalties imposed hereby for such de-
[fol. 12] linquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

"At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable

for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

"It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act."

It is provided by said Act (Sec. 21) that the State Board of Equalization shall have the power to make tax assessments, to make determination of the amount of taxes, penalties and interest due, to make and prescribe rules and regulations relating to the administration and the enforcement of the provisions of the said Act and the said Board is charged with the enforcement of the provisions thereof.

The Attorney General of the State of California is the chief legal representative and attorney for said State and for said Board and, under the Constitution and laws of said [fol. 13] State, there is vested in him the power and imposed upon him the duty to represent the State in the commencement and prosecution and/or to direct the institution and prosecution of suits for taxes or penalties due to the State of California and generally to represent the State as its attorney at law in the collection of taxes or other indebtedness due the State of California or to prosecute persons liable to penalties provided for in tax statutes including the said Use Tax Act of 1935, and it is expressly provided by said Act (Sec. 28) that at any time within three years after any amount required thereby to be collected has become due and payable, and any time within three years after the delinquency of any tax, the Board may bring an action in the courts of this State or any other state, or any court of the United States in the name of the People of California, to collect the amount delinquent, together with penalties and interest, and that the Attorney General must prosecute such action.

The said Act contains provisions relating to reassessments, redetermination of taxes paid, and refunds for erroneous or illegal payments, and expressly provides by the

terms of Section 25 thereof (Section 25 as amended 1937; formerly Section 29), as follows:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento, for the recovery of the amount paid under protest. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceeding the date of the refund warrant by not more than thirty days, such date to be determined by the board.

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or [fol. 14] other person paying said amount, or by any person other than the person who has paid such amount."

V

Pertinent Rules and Regulations of Defendant State Board of Equalization

The defendant State Board of Equalization did on the first day of July, 1935, promulgate and adopt the following rules and regulations:

"Ruling No. 3, Retailers maintaining a place of business in this State and making sales of tangible personal property, the storage, use or other consumption of which is subject to the tax, must at the time of making such sales collect the tax from the purchaser and give the purchaser a receipt therefor,

"Retailers who do not maintain a place of business in this State may, upon obtaining a certificate of authority from the Board, collect the tax from purchasers, give them receipts therefor and pay the tax to the Board in the same manner as retailers maintaining places of business in this State."

"Ruling No. 5. Purchasers of tangible personal property, the storage, use or other consumption of which is subject to the tax, should at the time of purchase of such property pay the tax to the retailer if the retailer maintains a place of business in this State and should obtain a receipt therefor from the retailer. Purchasers should not pay the tax to retailers who do not maintain a place of business in this State unless such retailers have obtained a certificate of authority from the Board to collect the tax."

"Ruling No. 6. 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.

"Any person making sales of tangible personal property for storage use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

"Ruling No. 8. Retailers making sales of tangible personal property, the storage, use or other consumption of which is not specifically exempted by the Use Tax Act and

the gross receipts from the sale of which are not subject to the Retail Sales Tax Act, must register with the Board on a form prescribed by the Board. No registration fee is required."

VI

Claim for Amount Alleged to be Due from Plaintiff and Threat of Prosecution by Defendants

Plaintiff, believing that it, being a resident of another state engaged in purely interstate commerce with citizens and residents of the State of California, was not and is not subject to the provisions of the said Act imposing bur- [fol. 15] dens, obligations and duties on retailers making sales for storage, use or other consumption in the State of California, did not during the period beginning July 1, 1935 and ending June 30, 1936 collect any tax from its purchasers of machines sold for delivery in this State during that period, nor has it collected any such tax on similar sales made subsequently thereto, nor has it filed any returns with the State Board of Equalization. Defendants, and each of them, nevertheless and notwithstanding plaintiff's status as aforesaid, claim that there is now due and owing by plaintiff to the State of California an amount equal to the tax alleged to be imposed by the said Act on the storage, use or other consumption in this State of all machines sold by plaintiff for delivery in this State during the aforesaid period beginning July 1, 1935 and ended June 30, 1936, to wit, the sum of $4,457.42, plus interest thereon in the sum of $435.42, and plus an additional sum of $445.74 as a penalty for plaintiff's failure to file returns with the State Board of Equalization as aforesaid; and defendants and each of them intend and directly and expressly threaten to, and unless restrained by the judgment or order of this Court, will, in pursuance of their said expressed intention, institute and cause to be instituted summary suits or other proceedings to compel payment of the said principal amount, penalty, and interest.

Defendants, and each of them, further threaten, in accordance with the procedure laid down in the Act, to cause summary process to be issued for seizure and sale of personal property of plaintiff used by plaintiff solely in its interstate commerce, and thereby plaintiff's said business will be interfered with to its great and irreparable damage in

the sum of more than $5,000, and for which plaintiff has no adequate remedy at law; and defendants and each of them threaten to and will bring repeated suits against plaintiff for further amounts representing the tax which plaintiff is alleged to have been required to collect from its purchasers on sales made subsequently to June 30, 1936, and for further amounts which plaintiff is alleged to be required to collect from its purchasers on sales to be made in the future under the provisions of the Act, together with penalties and interest thereon, and thereby subject plaintiff to a multiplicity of suits and harassing litigation to plaintiff's great and irreparable loss and damage.

[fol. 16]

VII

Irreparable Loss and Damage

Compliance with the demands of defendants herein would require plaintiff to pay to the State Board of Equalization on or before November 14, 1937 (under penalty of having the amount now claimed to be due increased by the additional sum of Four Hundred Forty-Five Dollars and Seventy-four Cents ($445.74) if not paid by that date) and would cause plaintiff to suffer the loss of the use of such money and the earning value thereof until recovered by suit, if recoverable at all; and in addition to the foregoing in order for plaintiff to comply with the requirements of the Act and the demands of the defendants it will be necessary for plaintiff: to register with the State Board of Equalization and, at great expense and inconvenience to furnish the said Board with whatever information concerning itself and its activites the said Board may require; to prepare and maintain at great expense and inconvenience such records, receipts, invoices and other pertinent papers as the said Board may require; to allow the said Board or any person authorized by it to inspect plaintiff's confidential records regarding its business, to its great detriment and inconvenience; to install and maintain at great expense and inconvenience a tax accounting system to account for the taxes which it is alleged to be required to collect from its purchasers; to render, at great inconvenience and expense because of the bookkeeping, clerical and accounting work required, quarterly or more frequent returns of all of its sales made for delivery in the State of California; to retain at all times and at great expense

legal counsel to interpret the provisions of the Act, under peril of incurring a penalty of ten per cent if their interpretation is wrong, for the purpose of determining whether the storage, use or other consumption of a machine sold for delivery in California is subject to the tax or exempt therefrom, otherwise to incur, to its untold loss and detriment, the displeasure of its California purchasers by requiring each and every one of them to pay over the tax alleged to be imposed by the Act regardless of whether the said customer is or is not liable for the tax; and to act as an involuntary and uncompensated tax collector for the State of California, subject to penalties and criminal fines if it should unwittingly and unintentionally err in performing ambiguously defined duties which it is not equipped to perform; all to its great and irreparable loss and damage [fol. 17] unless it shall be relieved therefrom by the injunction sought in this proceeding.

VIII

Effect of the Statute as Construed and Applied by Defendants

The effect of the application of the provisions of the Act to plaintiff by defendants, and each of them, is in violation of Article I, Section 8, Clause 3, of the Constitution of the United States and Article I, Section 3, of the Constitution of the State of California and said tax constitutes a direct burden on interstate commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3, and Article I, Section 10, Clause 2, of the Constitution of the United States, and is a taking of plaintiff's property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and Article I, Sections 3 and 13 of the Constitution of the State of California.

IX

Lack of Adequate Remedy at Law

Plaintiff is without a plain, speedy and adequate remedy at law in this or any other court of the United States or of

the State of California, and alleges that its remedy at law in the premises is inadequate in the following particulars:

(a) The only remedial procedure prescribed by said Act for the recovery of amounts paid or which may be paid by the plaintiff under said Act is to make payment of such amounts under protest and bring an action for the recovery thereof wthin one year following the payment thereof, against the State Treasurer of the State of California, in a court of competent jurisdiction in the County of Sacramento, for the recovery of the amount so paid under protest; that a court of competent jurisdiction in the County of Sacramento, as plaintiff believes, is a state court of competent jurisdiction, being the Superior Court of said county; that such provision of the Act is not intended to provide for an action in a federal court, and that the term "a court of competent jurisdiction in the County of Sacramento" is not descriptive of the federal court, although including within its jurisdiction the said county; and that such provision is so uncertain and indefinite that it fails to provide plainly and unequivocally a remedy at law, available to the [fol. 18] plaintiff in the federal court, and that such question is undetermined either by decision of the state courts or federal courts.

(b) The statutory remedy at law prescribed by said Act is inadequate and incomplete in that the provisions of said Section 25, as hereinbefore quoted, show that in the action prescribed thereby for recovery of amounts paid under protest, interest may or shall be allowed, upon judgment for the plaintiff, upon the payment found to have been illegally collected, from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than 30 days, such date to be determined by the State Controller, and according to said provision, the said law fails to provide for the payment of interest for the full and complete period during which the taxpayer would be without the use of the amount of money so paid under protest for such time within 30 days as may be arbitrarily determined by the Controller, which lack of interest payment may extend for a longer period upon any failure to deliver such warrant to the taxpayer upon the date of its issue, and that the provisions of said statute for the

payment of interest on account of the wrongful collection of such amount is indefinite and uncertain.

(c) Plaintiff further alleges that the said Act requires such taxes, when collected, to be deposited in the State Treasury to the credit of the retail sales tax fund (not use tax fund) and contains provision for an appropriation for specified purposes and provides that all fees, taxes, interest and penalties collected under said Act in excess of said appropriation for specified purposes shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds under said Act, or be transferred to the general fund of the State; and plaintiff is informed and believes, and therefore alleges, that excepting the amount so appropriated for specified purposes, the amounts drawn for the purpose of making current refunds which are or have become due or payable, all taxes, penalties and interest so collected, are transferred and paid to the general fund of the state, that Section 25 of said Act provides for the satisfaction of judgment but does not authorize any of the defendants or the State Treasurer of the State of California, to pay such judgments, nor is there any express provision in said Act requiring the State Controller to pay the same; and no definite procedure is laid down by said Act [fol. 19] for the payment, collection or enforcement of any judgment for the recovery of such amounts against the State Treasurer, or against the State of California, or against the State Board of Equalization; that said Act does not clearly provide an appropriation for the payment of any such judgment nor does it appear that the court's judgment is or shall be final authority for the payment of such judgment, but under the language of said statutes, refunds, if refunds embrace judgments, can only be made upon order of the State Controller which obviously contemplates a further and separate proceeding to secure his order rather than that the judgment itself shall be authority for the payment thereof, and in these respects, plaintiff's remedy at law is uncertain, indefinite, incomplete and inadequate.

(d) The remedy at law prescribed in said Act, or any remedy at law available to the plaintiff under the prohibition and limitation of said statute, would necessarily involve a multiplicity of actions because the only remedy available to the plaintiff is the remedy specified in said Act

by making each payment under protest and bringing suit within one year against the State Treasurer of the State of California to recover such payment; that litigation to finally determine plaintiff's liability in the premises would, according to plaintiff's experience and by the common experience in like litigation, known to the court, in all probability involve a period of time of one to two years or possibly a longer period should such litigation require final decision by the Supreme Court of the United States, which plaintiff believes would be likely, and that in the meantime, plaintiff would be required to make great multitudes of protests and to bring numerous suits at law, within one year after each tax payment date, and that such multiplicity of suits would involve the plaintiff in much expense, annoyance and injury which would be irreparable and thereby deny to the plaintiff a plain, speedy and adequate remedy at law.

X

Plaintiff is ready, able and willing to furnish a sufficient bond to be approved by this Court in such amount and upon such terms and conditions as may be required by this Court as a condition for the issuance of any temporary restraining order or interlocutory injunction which may be granted herein.

XI

Effect of the Injunction Prayed for on the Revenues of the State of California

[fol. 20] The injunction herein prayed for will in no wise reduce or impair the revenues of the State of California for the reason that the tax levied by the said Act is imposed upon the owner of the property purchased for storage, use or other consumption in this state, and each such owner is directly and primarily liable to the said State for the tax so imposed, and all of the remedies provided by the said Act for the collection of the tax so imposed are available to the said State in proceedings by said State directly against such owner.

Prayer for Relief

Wherefore, in consideration of all of the foregoing, and for as much as the plaintiff is remediless in the premises according to either the laws of the State of California or

of the United States, or under the common law and remediable only in equity in this Honorable Court, plaintiff prays as follows:

1. That upon the filing of this complaint and upon the making and filing by plaintiff of a good and sufficient bond, in the form and amount approved by this Honorable Court, that there be issued forthwith, an order restraining, for the period allowed by law and pending the hearing of plaintiff's motion for interlocutory injunction, the defendants, and each of them and all persons acting under their direction or under the direction of either of them, from enforcing, proceeding to enforce or taking any measures to enforce the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935 of the State of California, in so far as the defendants and each of them may apply or attempt to apply the same so as to compel plaintiff to pay over to the State of California the principal sum, penalty and/or interest now alleged by defendants to be due and owing to the said State; or so as to impose or have imposed upon plaintiff the duty or obligation of collecting from its purchasers, or any of them, and paying over to the State of California any tax which may be imposed by the said Act; or so as to impose upon plaintiff the duty or obligation of registering with the State Board of Equalization, filing returns and/or furnishing any information to the said Board; or so as to impose the duty or obligation of performing any other act under the provisions of the said Act, and that said defendants and each of them, their agents, servants and employees, and all persons acting or claiming to act under their direction or under the direction of either of them, be restrained and enjoined from imposing or col- [fol. 21] lecting on account thereof, any amount alleged to be due and owing to the State of California, or from commencing any prosecution or summary process against the plaintiff on account thereof, or from setting up, assessing or claiming or proceeding to set up, assess or claim any amount alleged to be due and owing from plaintiff to the State of California under said Act.

2. To the end that plaintiff may be protected in its business and property and saved from the hereinbefore described heavy statutory penalties and may not be subjected to a multiplicity of suits which will otherwise result, and may not suffer great and irreparable injury, loss and

damage, and may be permitted to pursue and carry on its said business without unlawful hindrance and obstructions, and that its property may not be subjected to illegal liens and clouds, plaintiff prays that writs of subpoena in equity issue forthwith to the defendants to this bill, and to each of them, in their respective official capacities, to appear, make and file their answer to this bill, but not under oath, answer under oath being hereby expressly waived; and that, upon due notice thereafter, hearing and determination shall be had herein by three judges of this Honorable Court, one of whom shall be a Circuit Judge as provided by law, or as provided by Section 380 of the U. S. Code, Ann. (Judicial Code Article 266, amended), and thereafter, that plaintiff have an interlocutory injunction against the said defendants and each of them, their agents, servants and employees, and against all persons acting or claiming to act under their direction, or under the direction of either of them, from proceeding to enforce said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, in so far as the defendants or any of them may claim that the same applies to plaintiff and/or to its operations and transactions in interstate commerce; and that said defendants, and each of them, their agents, servants and employees, and any and all persons claiming or purporting to act in behalf of any of them or each of them, be restrained and enjoined from imposing or collecting on account thereof, any taxes, penalties or interest thereon, or from commencing any prosecution or suits, or issuing any summary process against the plaintiff on account thereof, or from proceeding or attempting to set up, assess or claim any debt, penalties or interest against this plaintiff, pending the final determination of plaintiff's prayer for a permanent injunction.

[fol. 22] 3. That upon the final hearing and determination upon the merits and the rendition of the final judgment herein by said statutory court of three judges as provided in said Section 380 of the U. S. Code, Ann., (Judicial Code, Article 266, amended), such Honorable Court order, adjudge and decree that the said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, in so far as the same may, by the defendants, be claimed to be applicable to plaintiff or to its operations and transactions in interstate commerce, all as hereinbefore

related in this bill of complaint, for the reason that the said Act imposes a direct burden on interstate commerce contrary to and in violation of the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States, and that the imposition and collection of any tax under said law against this plaintiff in the manner aforesaid, would effectuate a taking of plaintiff's property without due process of law, in violation of the 14th Amendment of the Constitution of the United States, and that plaintiff has no adequate remedy at law in the premises and is entitled to a permanent injunction, restraining the enforcement of said law in said respects, and that such Honorable Court further find that said law, in any attempted application, as hereinbefore alleged, by defendants, and each of them, against this plaintiff, be held null and void and of no effect, upon the grounds, and for the reasons set out and alleged herein, and upon such other grounds and for such other reasons as to this Honorable Court may seem just and reasonable, and may, by this Honorable Court, be found to exist, and that a permanent injunction issue herein against said defendants, and each of them, their agents, servants and employees, and any or all persons acting, or claiming to act under their order or at their behest, restraining the enforcement and execution of all of said provisions of said California Use Tax Act of 1935, Chapter 361, Statutes of 1935, of the State of California, and any attempt to collect any amount thereunder from this plaintiff in the manner aforesaid, and that plaintiff have such other or further relief in the premises as the nature and the circumstances of this case may require, and to such Honorable Court may seem meet, just and agreeable in equity.

Thomas R. Dempsey, A. Calder Mackay, Attorneys for Plaintiff.

[fol. 23] *Duly sworn to by George J. Coupe. Jurat omitted in printing.*

[fol. 24] EXHIBIT "A" TO BILL OF COMPLAINT

General Agent's Contract

This Contract, made the First day of July, 1936, between Felt & Tarrant Manufacturing Co., a Corporation incorporated under the laws of the State of Illinois, and located

and doing business in the City of Chicago, in said State, Party of the First Part, and John M. Flowers, of the City of Los Angeles, in the State of California, Party of the Second Part.

Witnesseth, that the Party of the First Part hereby contracts with the Party of the Second Part, to solicit orders for Comptometers in the Territory comprising:

That part of the State of California situated south of the Northern boundary of the counties of Santa Barbara, Ventura, Los Angeles, and San Bernardino, for the period of one year from the date of this Contract, upon the following terms and conditions:

The Party of the First Part Agrees:

1. To pay to the Party of the Second Part a commission of twenty-five per cent (25%) on each Comptometer sold by the Party of the First Part upon orders taken by the Party of the Second Part within the said territory, payable when full payment has been made for each Comptometer so sold.

2. That it will credit to the Party of the Second Part the commission upon all sales of Comptometers to responsible parties within the said Territory on whom Party of the Second Part has called and demonstrated the Comptometer within three months preceding the date of such sales and immediately reported said call to Party of the First Part. But the Party of the First Part reserves the right to solicit orders from prospects and customers who have not been called on for over three months and fill orders received from such solicitation without being obliged to credit a commission to the Party of the Second Part.

3. That this Contract shall be deemed renewed for one year, provided Two Hundred Seventy-Five Comptometers be sold by the Party of the First Part within the said territory during the first year, upon orders actually solicited by the Party of the Second Part: and for the further period of one year, provided Three Hundred Comptometers be sold during the second year.

4. That the Party of the Second Part shall have the exclusive rights within said territory under this Contract, except as herein provided.

[fol. 25] 5. To pay for the Party of the Second Part the rent of any office in the City of Los Angeles the lease for which has been approved by Party of the First Part, with the understanding that this office shall be used exclusively in furthering the business of the Party of the First Part.

6. To pay a part of the traveling expense incurred by party of the Second Part, his Sub Agents or his Demonstrators, while traveling in the said territory outside of the City of Los Angeles on business trips which have been authorized by the Felt & Tarrant Manufacturing Co., as follows:

(a) All railroad, interurban, or bus fare incurred by Party of the Second Part on such trips.

(b) An allowance of 4 cents per mile for each mile Party of the Second Part may choose to use his automobile in making such outside trips from city to city. This mileage allowance is not intended to apply to the use of his automobile by Party of the Second Part within the city limits of Los Angeles.

(c) An allowance of $3.00 per night lodging charge for each night spent in a hotel by Party of the Second Part on such trips.

Provided these expenses named in Sections A, B and/or C of this paragraph are reported to Party of the First Part in accordance with its instructions.

7. To credit to the Party of the Second Part a participation of 50% in an advance of $120.00 or less, but to a participation of only $60.00 in any advance larger than $120.00 of each Sub Agent who is employed by Party of the Second Part exclusively in selling and demonstrating the Comptometer, provided the employment of such Sub Agent has been approved by Party of the First Part.

8. To credit to the Party of the Second Part a participation of $40.00 per month in the salary of any Demonstrator employed by Party of the Second Part exclusively on outside demonstrating and instructing, provided the employment of such Demonstrator has been approved by Party of the First Part.

9. That all orders taken by Party of the Second Part and accepted by Party of the First Part will be filled as promptly as possible.

10. To furnish the necessary sample machines to be used exclusively for demonstration, trial, and such other uses as may be authorized from time to time by Party of the First Part.

The Party of the Second Part Agrees:

1. To devote his entire time and attention to the solicitation of orders for the Party of the First Part unless otherwise mutually agreed; not to interest himself directly or indirectly in selling, soliciting orders for, or recommending any other computing machine designed for any arithmetical calculation; under no conditions to buy or sell an old Comptometer nor any old or new competing machine or machines on his own account, nor to devote any portion of his time during customary business hours to any business other than that of the Party of the First Part. And Second Party further agrees at all times during the life of his Contract to solicit orders and conduct his business as general agent for Party of the First Part in accordance with the terms of this Contract and any written instructions which may hereafter be given by Party of the First Part to all General Agents for the mutual guidance and good of all concerned.

2. That all Comptometers shipped by Party of the First Part to the Party of the Second Part shall remain the property of the First Part, and further agrees to return all such Comptometers within thirty days after the termination of the Contract, unless other disposition of said machines has been previously ordered by Party of the First Part. That while such machines are in his possession, to take good care of them and to restrict their use to that of samples, repair loans, trials, and such other uses as may be authorized from time to time by Party of the First Part.

3. That all orders taken must be submitted to and approved by Party of the First Part, and that all Sales and deliveries shall be made by the Party of the First Part, and that all bills for such orders as are accepted shall be rendered by the Party of the First Part. That he shall not

collect any monies due upon orders so accepted and billed, and that all payments shall be made directly to Party of the First Part.

[fol. 26] 4. To keep up a list of customers and machines sold in this territory, and to ship at the termination of this Contract to Felt & Tarrant Mfg. Co., Chicago, such records and all other office records, correspondence and General Sales Letters as may have been sent to him.

5. To personally make at least Four calls per day on parties theretofore uninterested in the Comptometer and demonstrate its use and working to them.

6. To make daily reports of all calls made; to report on the proper forms the serial numbers of any Comptometers placed on trial or placed as repair loans with customers; to make out promptly and send in to Chicago a monthly machine report showing the exact location of all Comptometers consigned to his care; and to furnish such other reports as may be required by Party of the First Part from time to time.

7. To maintain at all times during the life of his Contract, at his own expense, exclusively for furthering the interests of the Party of the First Part under this Contract, as large a force of capable, trained salesmen as directed by Party of the First Part, and personally and by said salesmen, to regularly canvass at frequent intervals all possible customers within said territory.

8. That if Party of the First Part voluntarily advances Second Party monies from time to time, or advances money at his request to his Sub Agents, Demonstrators, Teachers, or otherwise, that these advances shall be charged against his commission account; and that if, on the termination of this Contract, such advances exceed the total of commissions and other credits under this contract, to repay on demand any such excess.

9. That under no conditions shall he rent any Comptometer furnished him by Felt & Tarrant Mfg. Co., nor collect from any customer or prospect any money for the use of any machine furnished. And that he will not recommend to any customer or prospect desiring a rental machine, any

individual, firm or corporation with whom he has any direct or financial interest.

10. That for a period of two years after the termination of this Contract, whether because of expiration or voluntary cancellation by either Party, that it would be unfair competition for Second Party to engage in any competitive business in the Territory covered by this Contract, and further agrees that neither personally nor as the representative of any other person, firm, or corporation shall he sell, repair or teach the operation of any adding or computing machines in said Territory, inasmuch as the information and experience obtained while in the employ of the Party of the First Part would unavoidably be used to his advantage and to the disadvantage of the Party of the First Part.

It is Mutually Understood and Agreed:

1. That this Contract may be cancelled by either Party on thirty days' notice in writing.

2. That this Contract shall bind the heirs, legal representatives, successors, and assigns of the Parties hereto, and that the Party of the Second Part shall not assign this Contract without the written consent of the Party of the First Part.

Witness the hands and seals of the Parties the day and year first above written.

Felt & Tarrant Mfg. Co., J. *O. Nevens,* Vice Pres.
[L. S.] John M. Flowers. [L. S.]

Approved Jun. 26, 1936.

[fol. 27] EXHIBIT "B" TO BILL OF COMPLAINT

Use Tax Act of 1935

Chapter 361, Statutes of 1935, as Amended

Chapters 401, 671 and 683, Statutes of 1937

An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately. (Original title; Statutes 1935, p. 1297.)

The people of the State of California do enact as follows:

Short Title

Section 1. This act is known and may be cited as the "Use Tax Act of 1935." (Original section; Statutes 1935, p. 1297.)

Definitions

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

(c) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. A transaction whereby the possession of property is

transferred but the seller retains the title as security for the payment of the price shall be deemed a purchase.

(d) "Sales price" means the total amount for which tangible personal property is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which [fol. 27-1] credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included, and "sales price" shall not include the amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit or the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(e) "Person" means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(f) "Retailer" means and includes every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act.

(g) "Board" means the State Board of Equalization.

(h) "Tangible person property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

(i) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(j) "In this State" or "in the State" means within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1297. Stats. 1937, Chap. 683, added provisions to (a) respecting use solely outside this State; added provisions to (d) respecting property returned by customers; and added provisions to (f) respecting sales at auction.

[fol. 27-2] Levy of Tax; Tax Rate; Receipt for Tax

Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the board, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

In the event that the excise tax herein imposed should be judicially determined to be a property tax, this act shall be regarded as having been enacted as of June 30, 1935, in the exercise of the power of classification conferred by section 14 of Article XIII of the California Constitution and all taxes, interest and penalties imposed, levied, assessed,

accrued or collected hereunder from such date and prior to the adoption of this amendment are hereby legalized and ratified and the assessment, levy, collection and accrual of all taxes, interest and penalties prior to the adoption of this amendment are hereby legalized, ratified and confirmed as fully to all intents and purposes as if this act had been adopted by the vote of two-thirds of all the members elected to each of the two houses of the Legislature. All such taxes, interest and penalties which had accrued and remained unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to the provisions of this act. Nothing contained herein shall be construed to import illegality to the tax imposed by this act. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1298. Stats. 1937, Chap. 683, added provisions ratifying the tax should it be judicially determined to be a property tax.

Exemptions

Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

[fol. 27-3] (a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(c) Gas, electricity and water, when furnished or delivered to consumers through mains, lines or pipes:

(d) Gold bullion, gold concentrates or gold precipitates, when sold by the producer or refiner thereof for storage, use or other consumption in this State.

(e) Property used for the performance of a contract on public works executed prior to August 1, 1933.

(f) Motor vehicle fuel, the gross receipts received from sales or distributions of which in this State are subject to the tax imposed thereon under the provisions of the "Motor

Vehicle Fuel License Tax Act," and not subject to refund.

(g) Food Products Purchased for Human Consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products, other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith.

The exemption of food products set forth herein is made subject to the condition that the gross receipts from retail sales of food products be exempted from the computation of the tax imposed by the Retail Sales Tax Act of 1933, and any amendments thereto; provided, however, that should the gross receipts from retail sales of food products not be exempted from the computation of the tax imposed by said act and any amendments thereto, or should the exemption of the gross receipts from sales of food products from the computation of the tax imposed by said act and any amendments thereto be declared unconstitutional or should the exemption of food products set forth herein be declared unconstitutional then the rate of tax set forth in section 3 hereof shall be two per cent on and after July 1, 1935.

(h) Newsprint. (Statutes 1937, Chapter 671; effective August 27, 1937.)

History.—Enacted Stats. 1935, p. 1299. Stats. 1937, Chap. 671, added (h).

[fol. 27-4] Exemption of Vessels

Sec. 4.7. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act, namely, any ship of more than one thousand tons burden purchased in this State from the builders thereof, with respect to which this tax would, if such ship had been pur-

chased outside this State or purchased in interstate commerce, be inoperative because prohibited under the Constitution or the laws of the United States of America or the Constitution of this State. (Statutes 1937, Chapter 401; effective August 27, 1937.)

History.—Added by Stats. 1937, Chap. 401.

Registration of Retailers

Sec. 5. Every retailer selling tangible personal property for storage, use or other consumption in this State shall within thirty days after the effective date of this act register with the board and give the name and address of all agents operating in this State, the location of any and all distribution or sales houses or offices or other places of business in this State and such other information as the board may require. (Original section; Statutes 1935, p. 1300.)

Collection of Tax by Retailers; Tax Receipts

Sec. 6. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under the provisions of section 4 hereof shall, at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales.

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

[fol. 27-5] The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this State. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1300. Stats. 1937, Chap. 683, clarified provisions respecting time at which the tax should be collected.

Quarterly Tax Returns and Tax Payments; Presumption That Storage, Use or Other Consumption of Tangible Personal Property Taxable

Sec. 7. The tax imposed by this act shall be due and payable to the board quarterly on or before the fifteenth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of July, 1935, and ending on the thirtieth day of September, 1935. Every retailer maintaining a place of business in this State shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property sold by the retailer, the storage, use or consumption of which became subject to the tax imposed by this act during the preceding quarterly period, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the retailer during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by retailers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath.

Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a retailer required or authorized hereunder to collect the tax, shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of

three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property purchased by such person, the storage, use or other [fol. 27-6] consumption of which became subject to the tax imposed by this act during the preceding quarterly period and with respect to which the tax was not paid to a retailer required or authorized hereunder to collect the tax, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a retailer required or authorized hereunder to collect the tax during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

The board, if it deems it necessary to insure the collection of the tax imposed by this act, may provide by rule and regulation for the collection of said tax by the affixing and canceling of revenue stamps and may prescribe the form and method of such affixing and canceling.

For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property by any person for delivery in this State is sold for storage, use or other consumption in this State unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this State by the purchaser thereof was purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1300. Stats. 1937, Chap. 683, clarified provisions respecting time at which the tax should be paid and added provisions establishing presumption of taxability with respect to property shipped to this State by the purchaser.

Delinquency Penalty; Interest

Sec. 8. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the board under the provisions of sections 9 and 10 hereof, within the time required by this act shall pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent thereof, plus interest at the rate of one-half of one per cent per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State. (Original section; Statutes 1935, p. 1301.)

[fol. 27-7] Additional Determinations

Sec. 9. If the board is not satisfied with the return and payment of the tax or the amount of tax herein required to be paid to the State by any person, it is hereby authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the board until paid. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent of such amount shall be added thereto. If any part of the deficency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent of such amount shall be added thereto. The board shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records

of the board. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1302. Stats. 1937, Chap. 683, clarified provisions respecting interest.

Arbitrary Determinations

Sec. 10. If any person neglects or refuses to make a return required to be made by this act, the board shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon any information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were re- [fol. 27-8] quired to be reported to the board until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent of the amount required to be paid by such person shall be added thereto in addition to the ten per cent penalty as above provided. Promptly thereafter the board shall give to such person written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1302. Stats. 1937, Chap. 683, clarified provisions respecting interest and penalties.

Jeopardy Determinations

Sec. 11. If the board believes that the collection of any tax or any amount of tax herein required to be collected and paid to the State will be jeopardized by delay, it shall thereupon make a determination of such tax or amount of tax

herein required to be collected, noting that fact upon such determination, and the amount thereof shall be immediately due and payable. If the amount specified in the determination is not paid within ten days after the service upon the person against whom the determination is made of notice thereof, such amount becomes final at the expiration of such ten days, unless a petition for redetermination is filed within such ten days, and the delinquency penalty and the interest provided in section 8 hereof shall attach to the amount of the tax or the amount of the tax required to be collected specified therein.

The person against whom a jeopardy determination is made hereunder may petition for the redetermination thereof pursuant to section 12 hereof; provided, however, that such petition for redetermination must be filed with the board within ten days after the service upon such person of notice of the determination; and provided further, that such person must within said ten-day period deposit with the board such security as it may deem necessary to insure compliance with the provisions of this act. Such security may be sold by the board in the manner prescribed by section 14 hereof. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1303. Stats. 1937, Chap. 683, added provisions respecting finality of the determination and petition for redetermination.

Petition for Redetermination; Hearing; Due Date of Determinations; Delinquency Penalty

Sec. 12. Any person from whom an amount is determined to be due under the provisions of section 9 or 10 hereof may [fol. 27-9] petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty day period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty day period, the board shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person an oral hearing and shall give such person ten days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The order or decision of the board upon a petition for redetermination shall become final thirty days after service upon such person of notice thereof.

All amounts determined to be due by the board under the provisions of section 9 or 10 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent of the amount determined to be due.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1303. Stats. 1937, Chap. 683, substituted thirty for fifteen day period for finality of determination of amount due and within which to petition for redetermination or pay the determination and thirty for sixty day period for finality of determination of amount due and within which to pay the determination following the order of the board upon a petition for redetermination.

Extension of Time for Filing Returns

Sec. 13. The board for good cause may extend for not to exceed thirty days the time for making any return required under the provisions of this act. (Original section; Statutes 1935, p. 1304.)

Security for Payment of Tax

Sec. 14. The board, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject thereto to deposit with it such security as the board may determine. The same may be sold by the board at public auction if it becomes necessary so to do in order to recover any tax, or any amount herein required to be collected, interest or penalty due. Notice of such sale may be served upon the person who deposited such security personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the person at his address as the same appears in the records of the board. Upon any such [fol. 27-10] sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the security. (Original section; Statutes, 1935, p. 1304.)

Limitation of Time for Making Additional Determinations

Sec. 15. Except in the case of a fraudulent return, or neglect or refusal to make a return, every notice of a determination of an additional amount due shall be mailed within three years after the return was filed. (Original section; Statutes 1935, p. 1304.)

Interest on Delinquent Payments

Sec. 16. All taxes or amounts herein required to be collected not paid to the board on the date when the same became due and payable shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid. (Original section; Statutes 1935, p. 1304.)

Overpayments; Refunds

Sec. 17. If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, from whom it was collected, or by whom paid to the board, and if approved by the State Board of Control the same shall be credited on any amounts then due from such person under this act or the California Retail Sales Tax Act of 1933, and the balance shall be refunded to such person, or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the date of overpayment. Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Interest shall be allowed and paid upon any overpayment of any amount of tax, if the overpayment was not made because of an error or mistake on the part of the person making such overpayment, at the rate of six per centum per annum as follows:

(1) In the case of a credit, from the date of the overpayment to the date of the allowance of the credit. Any interest allowed on any credit shall first be credited on any amounts due from the person to whom the credit is given under this act or the California Retail Sales Tax Act of 1933.

[fol. 27-11] (2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the board.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California and such action shall be tried in the county of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that any amount has been illegally determined to be due from any person the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of such amount upon the records of the board. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1304. Stats. 1937, Chap. 683, added provisions respecting filing of claim for refund within three years from the date of overpayment and provisions respecting interest on overpayments.

Fraud or Evasion of Tax

Sec. 18. If fraud or evasion on the part of any person is discovered by the board, it shall determine the amount by which the State has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts should have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in sec-

tion 8 hereof shall attach thereto. (Original section; Statutes 1935, p. 1305.)

Report of Board to Controller

Sec. 19. The board shall report to the Controller the amount of collections under this act and he shall keep a record thereof. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1305. Stats. 1937, Chap. 683, omitted provisions that board report all assessments and substituted therefor that board report amount of collections.

[fol. 27-12] Collection Procedure; Lien of Tax

Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county clerk in a loose-leaf book entitled, "Special Judgments for State Retail Sales or Use Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount herein required to be paid, together with interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer or other person liable for the tax, interest or penalty in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execu-

tion shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount of taxes herein required to be collected [fol. 27-13] by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

In the event that any peron is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter sell at public auction such property so seized, or a sufficient

portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

[fol. 27-14] At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court

of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act. (Original section; Statutes 1935, p. 1305.)

Records; Administration of Act by Board

Sec. 21. Every retailer and every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall keep such records, receipts, invoices and other pertinent papers in such form as the board may require.

The board or any person authorized in writing by it is hereby authorized to examine the books, papers, records and equipment of any person selling tangible personal property and any person liable for the tax imposed by this act and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount required to be paid hereunder.

The board is hereby charged with the enforcement of the provisions of this act and is hereby authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the [fol. 27-15] provisions of this act and to employ such accountants, auditors, investigators, assistants and clerks as may be determined to be necessary for the efficient administration of this act and may designate representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this act or other laws of this State upon the board.

The board may prescribe the extent, if any, to which any ruling or regulation relating to this act shall be applied without retroactive effect. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1307, providing for assessments against consumers. Stats. 1937, Chap. 683, repealed the original section, renumbered section 25 as section 21 and added thereto provisions respecting the designation of representatives to perform duties imposed upon the board and provisions respecting the retroactive effect of rulings.

NOTE.—The subject matter of original section 21 is now covered in sections 9 and 10.

Information Confidential

Sec. 22. It shall be unlawful for the board, or any person having an administrative duty under this act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income. profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or copy thereof of any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the Governor may authorize examination of such returns by other State officers, by tax officers of another State, or the Federal Government, if a reciprocal arrangement exists, and any other persons the Governor may so authorize.

Any violation of the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1308, providing for hearings on assessments against consumers and the due date of such assessments. Stats. 1937, Chap. 683, repealed the original section and renumbered section 26 as section 22.

NOTE.—The subject matter of original section 22 is now covered in section 12.

Disposition of Proceeds

Sec. 23. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of re-

mittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund. The moneys paid under this act and deposited in the retail sales [fol. 27-16] tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1308, providing for refunds to consumers. Stats. 1937, Chap. 683, repealed the original section, renumbered section 27 as section 23 and omitted therefrom appropriations for the State Board of Equalization, the Controller, the State Department of Finance and the State Treasurer.

Note.—The subject matter of original section 23 is now covered in section 17.

Suit to Enforce Payment

Sec. 24. At any time within three years after any amount herein required to be collected has become due and payable and any time within three years after the delinquency of any tax, the board may bring an action in the courts of this State, any other State or in any court of the United States in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest. The Attorney General must prosecute such action. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the amount due hereunder, of the delinquency and of the compliance by the board with all the provisions of this act in relation to the computation and determination of such amount.

In any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at

his principal or home office. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1309, providing for the recovery of erroneous refunds. Stats. 1937, Chap. 683, repealed the original section and renumbered section 28 as section 24.

NOTE.—The subject matter of original section 24 is now covered in section 17.

Payment under Protest; Suit for Refund

Sec. 25. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to [fol. 27-17] the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date

of the refund warrant by not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1309, providing for the administration of the act by the State Board of Equalization. Stats. 1937, Chap. 683, renumbered section 25 as section 21 and renumbered section 29 as section 25, extending the limitation period therein from sixty days to one year.

Penalty for Failure to Make Return or for Making False or Fraudulent Return

Sec. 26. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not [fol. 27-18] more than five thousand dollars ($5000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1309, providing for the confidential nature of all information obtained in the administration of the act. Stats. 1937, Chap. 683, renumbered section 26 as section 22 and renumbered section 30 as section 26.

Penalty for Violation of Act

Sec. 27. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and

punishable as such. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1310, providing for the disposition of the proceeds of the tax. Stats. 1937, Chap. 683, renumbered section 27 as section 23 and renumbered section 31 as section 27.

Constitutionality

Sec. 28. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1310, providing for suits to enforce payment of the tax. Stats. 1937, Chap. 683, renumbered section 28 as section 24 and renumbered section 33 as section 28.

Act Effective Immediately

Sec. 29. This act, inasmuch as it provides for a tax levy for the usual current expenses of the State, shall, under the provisions of section 1 of Article IV of the Constitution, take effect immediately. (Statutes 1937, Chapter 683; operative July 1, 1937.)

History.—Enacted Stats. 1935, p. 1310, providing for suits to recover tax paid under protest. Stats. 1937, Chap. 683, renumbered section 29 as section 25 and renumbered section 34 as section 29.

Penalty for Failure to Make Return or for Making False or Fraudulent Return

Sec. 30. Renumbered section 26 by Statutes 1937, Chapter 683; operative July 1, 1937.

History.—Enacted Stats. 1935, p. 1311.

Penalty for Violation of Act

Sec. 31. Renumbered section 27 by Statutes 1937, Chapter 683; operative July 1, 1937.

History.—Enacted Stats. 1935, p. 1312.

[fol. 27-19] Review of Order of Board

Sec. 32. Repealed by Statutes 1937, Chapter 683; operative July 1, 1937.

History.—Enacted Stats. 1935, p. 1312, providing for judicial review of orders of the board.

Constitutionality

Sec. 33. Renumbered section 28 by Statutes 1937, Chapter 683; operative July 1, 1937.

History.—Enacted Stats. 1935, p. 1312.

Act Effective Immediately

Sec. 34. Renumbered section 29 by Statutes 1937, Chapter 683; operative July 1, 1937.

History.—Enacted Stats. 1935, p. 1312.

[fols. 28-33] [File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Stipulation and Order for Continuance of Hearing on Application for Interlocutory Injunction, and for Extension of Temporary Restraining Order—Filed November 19, 1937

Whereas, there issued from the above entitled court on the 12th day of November, 1937 a temporary restraining order and order to show cause why the defendants should not be enjoined from enforcing, or attempting to enforce, against the plaintiff the provisions of the California Use Tax Act of 1935 and from collecting or attempting to collect from plaintiff any amount then alleged by said defend-

ants to be due and owing from the plaintiff to the State of California under the provisions of said Act; and said order to show cause was made returnable before said court at Los Angeles, California, on the 20th day of November, 1937, at 10:00 A. M.; and

Whereas, it appears that the Honorable Wm. P. James, who issued said order is confined to his home by illness and that it is impossible to assemble, at the time and place aforesaid, the three-judge court required by law to hear and determine the application for the interlocutory injunction sought by plaintiff herein, and that said application cannot be heard before the 27th day of November, 1937, at 10:00 A. M.

Now, Therefore, it is hereby stipulated by and between the parties hereto, by their respective attorneys, that the hearing on the aforesaid order to show cause may be continued to the 27th day of November, 1937, at 10:00 A. M., in the courtroom of the above entitled court at Los Angeles, California; and that by reason of the premises the temporary restraining order heretofore issued in this cause may be

W. L. B. [fol. 35] extended and continued in force until said hearing on Nov. 27, 1937

T. R. D. [pending the hearing and determination by the

A. C. M. court of plaintiff's application for an interlocutory injunction.]*

Dated November 19, 1937.

Thomas R. Dempsey, A. Calder Mackay, Attorneys for Plaintiff. Walter Bowers, Deputy Attorney General, Attorneys for Defendants.

It is so Ordered, November 19, 1937. Wm. P. James, District Judge.

[File endorsement omitted.]

[* Matter enclosed in brackets, struck out in copy.]

[fol. 36] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF HEARING OF APPLICATION FOR INTERLOCUTORY INJUNCTION—Filed November 27, 1937

To Hon. Frank F. Merriam, Governor of the State of California:

You will please take notice:

That the above named plaintiff has filed a bill of complaint in equity against the above named defendants in the above entitled court, seeking to enjoin the enforcement of the defendants against the plaintiff of certain provisions of the California Use Tax Act of 1935 (Cal. Stats. 1935, Chap. 361) and the collection by the defendants from the plaintiff of certain amounts, interest and penalties prescribed by said Act, on the ground that the application of the provisions of said Act to the plaintiff by the defendants is violative of Article I, Section 8, Clause 3, Article I, Section 10, Clause 2, and the Fourteenth Amendment of the Constitution of the United States, and Article I, Sections 3 and 13 of the Constitution of the State of California; all of which is more fully set forth in the copy of said bill which is served upon you herewith.

That the above entitled court on November 12, 1937 issued a temporary restraining order and order to show cause, a copy of which is herewith served upon you.

That the date for the hearing on said order to show cause has been continued by said court from November 20, 1937, at 10 o'clock A. M. to November 27, 1937 at 10 o'clock A. M. at the court room of said court at Los Angeles, California.

That service of said bill, temporary restraining order and order to show cause, and of subpoena directed to said de-
[fol. 37] fendants has been made on all of said defendants, excepting the defendant John C. Corbett; and that a copy of the aforesaid papers has been lodged with the Marshal of the above entitled court for service on said defendant John C. Corbett.

Dated November 19, 1937.

Thomas R. Dempsey, A. Calder Mackay, Attorneys for Plaintiff, 1104 Pacific Mutual Building, Los Angeles, California.

[File endorsement omitted.]

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed November 27, 1937

To the Honorable the District Court of the United States, in and for the Southern District of California, Central Division:

Come now the above named defendants, and each of them, and hereby move the above entitled Court to dismiss the Bill of Complaint in Equity filed herein, and to dismiss the said above entitled cause upon and for the following grounds and reasons, and each thereof:

I

That no valid cause of action in equity exists against said defendants or any or either of them in favor of plaintiff, and that it appears from the said Bill of Complaint that there is insufficiency of fact to constitute any such valid cause of action in equity, and that such Bill of Complaint does not state facts sufficient to constitute a cause of action of any kind.

[fol. 39]

II

That said Bill of Complaint does not show that this Court has jurisdiction by reason of the amount involved and that, further, the same shows upon its face that it does not have jurisdiction by reason of the amount involved, and that the said amount involved as shown by said Bill of Complaint is less than the amount provided and required by statute.

III

That said Bill of Complaint does not show that this Court has jurisdiction by reason of any federal question involved, and, further, that said Bill shows upon its face that no federal questions are involved, and that the alleged federal questions mentioned therein are frivolous and unsubstantial.

IV

That said Bill of Complaint shows that the said cause of action alleged, if any, and attempted to be set up, is not against the said defendants named, but is, in fact, against

the State of California, and that this Court has no jurisdiction of any action against the said State of California.

V

That this Court is without jurisdiction under any section of the Judicial Code, or otherwise, or at all, to entertain the said Bill of Complaint, and/or to grant the relief prayed for therein.

VI

That said Bill of Complaint does not, nor do any of the allegations therein contained, entitle plaintiff to any relief in equity.

[fols. 39½-42] VII

That it is not shown by said Bill of Complaint that the plaintiff will suffer irreparable injury by reason of any of the matters and things in said Bill contained or alleged, and that said Bill shows upon its face that the only injury or damage which plaintiff can or may sustain is to be subjected to an action at law in the place of its residence for a monetary debt of definite and certain amount.

Wherefore, defendants, and each of them, pray that this Court dismiss the said Bill of Complaint in Equity and plaintiff's costs, and dismiss the said cause of action.

Dated November 26, 1937.

Respectfully submitted, U. S. Webb, Attorney General, by Walter L. Bowers, Deputy Attorney General, Attorneys for Defendants.

WLB:F.

[fol. 43] In United States District Court

[Title omitted]

Amendment to Bill of Complaint—Filed December 31, 1937

To the Honorable the District Court of the United States in and for the Southern District of California, Central Division:

By leave of the Court first had and obtained, the plaintiff above named presents this amendment to its bill of com-

plaint heretofore filed in this cause, as a part of and in addition to the allegations of said bill of complaint, all of which are hereby referred to and adopted hereby; and in that behalf alleges:

Plaintiff is informed and believes and on such information and belief alleges that plaintiff has pursued and exhausted all of the remedies available to it in the premises under and by virtue of the provisions of the Use Tax Act of the State of California prior to actual payment of the tax, interest and penalties determined and demanded by the defendant State Board of Equalization of the State of California.

Under date of July 23, 1937 the defendant Board of Equalization issued and transmitted by mail to the office of plaintiff located at Chicago, Illinois, a notice of determination by said defendant that there was due from plaintiff, for the period commencing July 1, 1935 and ending June 30, 1936, use tax in the sum of $4,457.42, interest thereon in the sum of $390.94 and penalties for delinquency in the sum of $445.74, making a total assessment of $5,294.10. Said notice of determination further stated that an additional penalty of $445.74 must be added if the amount of the assessment were not paid by August 29, 1937, and that addi-
[fol. 44] tional interest of $22.29 must be added for each month or fraction thereof after August 15, 1937.

Within the time allowed by said Act and the rules of said defendant Board of Equalization plaintiff filed with said defendant Board of Equalization its petition for redetermination of the tax, interest and penalties determined as aforesaid. On or about October 4, 1937 an oral hearing on said petition for redetermination was held before said defendant Board of Equalization. On or about October 8, 1937 said defendant Board of Equalization issued and served on plaintiff a notice of redetermination, which stated that the Board's review of its previous determination indicated no cause for adjustment, added interest in the sum of $44.58 to the amount previously determined, and redetermined a total amount due from plaintiff in the sum of $5,338.68; and stated that additional interest of $22.29 for each month or fraction thereof after October 15, 1937 must be added if not paid on or before that date, and penalty in the amount of $445.74 must be added if not paid on or before November 14, 1937.

By the provisions of Section 12 of said Act, as amended by Statutes 1937, chapter 683, operative July 1, 1937, the decision of the defendant Board of Equalization upon said petition for redetermination became final thirty days after service upon plaintiff of notice thereof, and said thirty days expired prior to the commencement of the above entitled suit.

Thomas R. Dempsey, A. Calder Mackay, Howard W. Reynolds, Attorneys for Plaintiff.

Duly sworn to by A. Calder Mackay. Jurat omitted in printing.

[fols. 45-46] It is hereby stipulated that the foregoing amendment to plaintiff's bill of complaint may be filed in the above entitled cau , with the same effect as though it had been filed prior to the appearance of the defendants; and that t motion to dismiss and return of the defendants heretofore filed shall be deemed to apply to the bill of complaint as amended.

Thomas R. Dempsey, A. Calder Mackay, Howard W. Reynolds, Attorneys for Plaintiff. U. S. Webb, Attorney General, by Walter L. Bowers, M., Deputy Attorney General, Attorneys for Defendants.

It is so Ordered, December 31, 1937. Wm. P. James, United States District Judge.

[File endorsement omitted.]

[fol. 47] In United States District Court, Southern District of California, Central Division

No. Eq-1284-J

Felt and Tarrant Manufacturing Co., a Corporation, Plaintiff,

vs.

John C. Corbett et al., as Members of the State Board of Equalization of the State of California; State Board of Equalization of the State of California, U. S. Webb, the Attorney General of the State of California, Defendants

Thomas R. Dempsey and A. Calder Mackay, Howard W. Reynolds, Wellman P. Thayer for plaintiff;

U. S. Webb, Attorney General, State of California, and Walter Bowers, Deputy Attorney General, for defendants.

Before U. S. Circuit Judge Albert Lee Stephens, U. S. District Judge William P. James, and U. S. District Judge H. A. Hollzer

[fol. 48] OPINION—Filed January 13, 1938

Plaintiff, an Illinois corporation engaged in the business of manufacturing and selling comptometers in that State for delivery to purchasers residing in various parts of the country, brings this suit to enjoin the enforcement of certain provisions, hereinafter noted, of the Use Tax Act of the State of California (Statutes 1935, Chapter 361). The defendants are members of the Board of Equalization (hereinafter referred to as the Board) and the Attorney General of said State.

Section 3 of the statute under attack provides in part that an excise tax is imposed on the storage, use or other consumption in the State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in the State at the rate of 3% of the sales price of such property.

Section 2, subdivision (b) of this act defines the word "use" as including "the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Subdivision (f) of the same section defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the Board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by [fol. 49] them, irrespective of whether they are making sales in their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for the purposes of this act."

Section 3 of the same statute prescribes, in part, that every person storing, using or otherwise consuming in the State tangible personal property purchased from a retailer shall be liable for the tax imposed by the act; provided, however, that a receipt from a retailer maintaining a place of business in the State or a retailer authorized by the Board, under such rules and regulations as it may prescribe, to collect the tax imposed and who shall for the purposes of the act be regarded as a retailer maintaining a place of business in the State, given to the purchaser shall suffice to relieve the latter from further liability for the tax.

The act likewise provides that the storage, use or other consumption in the State of certain kinds of personal property is exempted from the tax, the items thus exempted consisting of property already subject to the California Retail Sales Tax Act of 1933, also motor vehicle fuel already subject to another tax, food products purchased for human consumption, property not subject to State taxation by reason of Federal or State law, and certain other items of property which for the purpose of this decision need not be enumerated.

By Section 5 of the statute every retailer selling tangible personal property for storage, use or other consumption in the State is required to register with the Board and furnish certain specified data and such other information as the Board may require.

[fol. 50] Section 6 of the act directs every retailer maintaining a place of business in the State, and making sales of tangible personal property for storage, use or other consumption in the State not exempted under the law, to collect the tax imposed by the act from the purchaser.

Section 7 directs every retailer maintaining a place of business in the State to file quarterly returns with the Board, in such form as the latter may prescribe, showing the total sales price of the property sold, subject to the tax and also to remit with such return the amount of the tax required to be collected.

Other provisions of the statute fix penalties for failure to pay the tax within the time prescribed, also empower the Board to proceed summarily to compute and collect the tax, plus penalties and interest, also to require the retailer to keep records, etc., in such form as the Board may prescribe, such records, etc., to be subject to the Board's inspection, also prohibit the granting of injunctive relief designed to

prevent the collection of the tax and limit the taxpayer to the remedy of paying the tax under protest and thereafter instituting suit for the recovery thereof in a court in the county where the State Capitol is located.

The Board has adopted various rules to enforce the provisions of the statute. By rule No. 5 it is provided that purchasers of tangible personal property the storage, use or other consumption of which is subject to the tax, should at the time of purchase of such property pay the tax to the retailer if the retailer maintains a place of business in this State and should obtain a receipt therefor from the retailer. [fol. 51] Rule No. 6 declares " 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business. Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

Plaintiff's method of doing business with respect to California purchasers is substantially as follows: Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect [fol. 52] to sub-agents and demonstrators. Under this contract the general agent must devote his entire time and at-

tention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers.

The complaint further alleges that each of these two general agents maintains an office in this State, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the State. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California.

It further appears from the complaint that plaintiff has not collected any of the tax prescribed by the statute in question and has not filed any returns with the Board. It is further alleged that the defendants claim that there is due [fol. 53] and owing by plaintiff to the State an amount equal to the tax imposed by said act on all machines sold by plaintiff for delivery in California during the period extending from July 1, 1935 to June 30, 1936, to-wit: the sum of $4457.42, plus interest amounting to $435.42, plus a penalty in the sum of $445.74. It is also alleged that defendants intend and threaten to and, unless restrained by order of court, will cause to be instituted summary proceedings to compel payment of the aforementioned sums; that defendants threaten to cause summary process to be issued for seizure and sale of plaintiff's property used by it solely in interstate commerce; also that defendants threaten to and will bring repeated suits against plaintiff for further amounts representing taxes which defendants claim plain-

tiff was required to collect from its California purchasers on sales made subsequently to June 30, 1936, together with penalties and interest thereon, thereby subjecting plaintiff to a multiplicity of suits and harassing litigation.

The complaint further alleges that the defendants demand that plaintiff register with said Board, also maintain various records and make reports to the Board from time to time and permit its records to be inspected by the Board's representatives. All of these threatened acts, unless restrained, it is alleged will cause plaintiff irreparable damage and loss.

While the complaint discloses that the suit is between citizens of different States, jurisdiction is based primarily upon the charge that application of the statute in question to plaintiff violates Article I, Section 8, Clause 3, also Article I, Section 10, Clause 2 of the 14th Amendment of the Constitution of the United States, in that it is claimed that the [fol. 54] requirements of the act constitute a regulation and a direct burden upon plaintiff's interstate commerce and that they deprive plaintiff of its property without due process of law. In addition, the complaint alleges that the application of the act to plaintiff is in violation of Article I, Sections 3 and 13 of the Constitution of the State of California.

A temporary restraining order and an order to show cause why an interlocutory injunction should not be granted having been issued, the defendants on the return day filed a motion to dismiss and also a return denying some of the material allegations of the bill. Following an oral argument the application for an interlocutory injunction and the motion to dismiss were ordered submitted.

The preliminary contention advanced by defendants to the effect that this suit in effect is a proceeding against the State and therefore the court lacks jurisdiction to entertain the same is disposed of by the rule announced in Sterling v. Constantin, 287 U. S. 378. In the latter case suit was instituted against the Governor and certain military officials of Texas to secure an injunction restraining them from enforcing certain military and executive orders regulating or restricting the production of oil from plaintiff's wells. In denying a similar objection as to alleged lack of jurisdiction the Court there said, (page 393):

"The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where

state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief (citing cases). The Governor of the State, in this respect, is in no different [fol. 55] position from that of other state officials (citing cases). Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the state, deprive the court of jurisdiction (citing cases)."

The principal defense interposed herein is in substance that the statute under attack imposes a tax, not upon personal property while it is in transit in interstate commerce nor upon the sale thereof, but upon the privilege of use of such property after commerce is at an end, and hence the tax is not upon the operations of interstate commerce, and does not burden the same. In support of their position the defendants rely mainly on the decision rendered in Monamotor Oil v. Johnson, 292 U. S. 86. In that case suit was filed to enjoin certain officers of the State of Iowa from enforcing the provisions of the laws of that State laying a tax on motor vehicle fuel. These laws declared it to be illegal to conduct the business of a distributor of such product unless a certificate giving certain information be filed with the State Treasurer and a license be procured permitting the conduct of such business, and further required the distributor to file monthly reports with the State Treasurer showing the total number of gallons imported by him during the preceding month, with certain further details, and at the same time requiring him to remit to the Treasurer the amount of the tax. In addition, these laws defined "distributor" as "any person who brings into the State or who produces, refines, manufactures or compounds within the State any motor vehicle fuel to be used within the State or sold or otherwise disposed of by him within the State for use in the State." Likewise these laws prescribed a penalty for failure to remit the amount of the tax, also em- [fol. 56] powered the Attorney General to bring action to recover the same, authorized the State Treasurer to revoke the license of a distributor failing to comply with certain provisions, required distributors to permit inspection of their records, etc. and made it a misdemeanor for a dis-

tributor to violate any of the provisions hereinbefore mentioned.

In the case last cited the plaintiff was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars and other containers for resale to consumers and to dealers selling to consumers, and the exportation of gasoline to other states, and also in the business of maintaining storage facilities in Iowa, from which deliveries were made in that and other states, also maintaining a refinery from which gasoline was shipped to points in Iowa and other states, and also maintaining service stations in that state which sold to consumers.

In affirming the ruling of the District Court dismissing the suit, the Supreme Court in the course of its opinion declared:

"There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, Section 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle oil imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property (citing cases). It is not laid upon the importer for the privilege of importing (citing cases), but falls on the local use after interstate commerce has ended (citing cases). The statute in terms imposes the [fol. 57] tax upon motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement, (citing cases). The distributor who reports the gasoline and pays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the state. To prevent evasion, the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; * * * Since the law declares that the levy is only upon use of motor vehicle

fuel in the state, and the intent is not to affect interstate commerce, the state treasurer properly permits distributors to deduct as a credit * * * that which has been exported from the state by the distributor * * *. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the State, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

"The method of imposition and collection of the tax does not deny the equal protection guaranteed by the XIV Amendment * * *. The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does."

In a more recent decision, Henneford v. Silas Mason Co., 300 U. S. 577, the Supreme Court, upholding the validity of certain legislation enacted by the State of Washington, consisting of a statute levying a tax on retail sales and a statute imposing a compensating tax upon the privilege of using personal property in the state, declared:

[fol. 58] "The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

The tax is not upon the operations of interstate commerce but upon the privilege of use after commerce is at

an end. Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. (Citing cases.) This is so, indeed, though they are still in the original packages. (Citing cases). For like reasons they may be subjected, when once they are at rest to a non-discriminatory tax upon use or enjoyment (citing cases, including Monamotor Oil Co. v. Johnson, 292 U. S. 86, 93) * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate (citing cases)."

In Bowman v. Continental Oil Co., 256 U. S. 642, while sustaining a decree enjoining the enforcement of a license tax levied against concerns engaged in the business of importing oil and gasoline products from other states and distributing the same in New Mexico, and also enjoining the enforcement of an excise tax upon the sale of such property in that State in the original form and condition as when imported (but not upon the sale of such products in broken packages), the Supreme Court held that such decree should be "without prejudice to the right of the State through appellants or other officers, to require plaintiff to render [fol. 59] detailed statements of all gasoline received, sold or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

These decisions make it clear that a State law, such as the one here under attack, in so far as it imposes a use tax upon personal property after the same has been brought into the State, does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution.

Accordingly, there remains for consideration only the question whether the State may require the seller to collect such tax and in connection therewith require the latter to conform to certain regulations in order to insure the collection of the tax.

We think this question must be answered in the affirmative. In this respect, we are unable to distinguish the statute here involved from the one upheld in the case of Monamotor Oil Co. v. Johnson, 292 U. S. 86. Nor are we

able to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute. The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California.

For the reasons herein set forth we conclude that this action must be dismissed and it is so ordered.

Dated this 11th day of January, 1938.

H. A. Hollzer, U. S. District Judge.

We Concur: Albert Lee Stephens, U. S. Circuit Judge. Wm. P. James, U. S. District Judge.

[File endorsement omitted.]

[fol. 60] In United States District Court

[Title omitted]

Decree of Dismissal—Filed April 23, 1938

This cause came on regularly to be heard at this term on the 27th day of November, 1937, having been regularly continued by stipulation from November 20th, 1937, before the Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, the Honorable William P. James, Judge of the District Court of the United States, for the Southern District of California, Central Division, and the Honorable Harry A. Hollzer, Judge of the District Court of the United States, for the Southern District of California, Central Division, organized and sitting as a three-judge court under and by virtue of the provisions of Section 380 of the United States Code Annotated (Judicial Code Section 266, as amended), for the hearing and determination of the application of plaintiff herein for an interlocutory injunction, Messrs. Thomas R. Dempsey, A. Calder Mackay, Howard W. Reynolds and Wellman P. Thayer appearing as counsel for plaintiff, and the Honorable U. S. Webb, Attorney General of the State of California, and Walter L. Bowers, Deputy Attorney General of said State, appearing as counsel for defendants,

[fol. 61] and the motion of defendants for a dismissal of plaintiff's complaint and of this action having also come on for hearing at said time and place, and having been heard and submitted, and the court having duly considered the oral arguments and the briefs filed by respective counsel, and being fully advised in the premises, and having rendered its decision that defendants' motion be granted and that the action must be dismissed;

It is, Therefore, Hereby Ordered, Adjudged and Decreed that the application of the plaintiff herein for an interlocutory injunction be and the same is hereby denied; and

It is Further Hereby Ordered, Adjudged and Decreed that the motion of defendants to dismiss the bill of complaint herein and to dismiss this action, be, and the same is hereby granted and sustained, and that this action be and the same is hereby dismissed, and that defendants and each of them have and recover of and from the plaintiff herein their costs herein incurred in the sum of $20.00.

It is Further Hereby Ordered, Adjudged and Decreed that the facts stated in the plaintiff's bill of complaint and in the opinion of this Court filed herein on the 13th day of January, 1938, be, and they are hereby taken and adopted as the Findings of Fact required by Equity Rule 70½, and that the Conclusions of Law stated in the said opinion of this Court may stand as the Conclusions of Law required by said Equity Rule 70½, and that an exception to each of said Conclusions of Law is hereby allowed to the party or parties aggrieved thereby.

[fols. 62-63] Dated April 23, 1938.

Albert Lee Stephens, United States Circuit Judge.
Wm. P. James, United States District Judge. H. A. Hollzer, United States District Judge.

Approved as to form as provided in Rule 44 of the United States District Court Rules, Southern District of California.

Thomas R. Dempsey, A. Calder Mackay, Attorneys for Plaintiff.

Decree entered and recorded Apr. 23, 1938.

R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk.

[File endorsement omitted.]

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed June 30, 1938

To the Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, and the Honorable the Judges of the United States District Court for the Southern District of California:

Your petitioner, Felt and Tarrant Manufacturing Co., a corporation, respectfully shows:

Petitioner is the plaintiff in the above entitled cause. On the 23d day of April, 1938, there was entered in said cause a decree denying the application of said plaintiff for an interlocutory injunction, pursuant to the provisions of section 266 of the Judicial Code, and dismissing the bill of complaint and cause of action of said plaintiff.

Petitioner, considering itself aggrieved by said decree, hereby appeals from said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed agreeably to the laws and rules of court in that behalf made and provided, and that an order be made fixing the amount of security which the petitioner shall furnish upon said appeal.

Dated June 30, 1938.

Thomas R. Dempsey, A. Calder Mackay, Wellman P. Thayer, Howard W. Reynolds, Attorneys for Plaintiff.

[fol. 65] ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND

Appeal allowed upon giving bond as required by law in the sum of Five hundred Dollars ($500).

Dated June 30th, 1938.

Wm. P. James, United States Dist. Judge.

[File endorsement omitted.]

[fol. 66] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed June 30, 1938

Comes now Felt and Tarrant Manufacturing Co., a corporation, plaintiff in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal, herewith petitioned for in said cause, from the decree of this court entered on the 23d day of April, 1938.

1. The court erred in sustaining the motion of the defendants herein to dismiss the plaintiff's bill of complaint and cause of action and in dismissing the said bill and cause of action.

2. The court erred in denying, after due notice and hearing, the application of the plaintiff for an interlocutory injunction in said cause.

3. The court erred in concluding from the facts found, and in ordering, that the action must be dismissed, and in entering its decree against the plaintiff and in favor of the defendants; for the reason that the facts found do not support said conclusion or said decree.

4. The court erred in concluding and deciding from the facts found that the State of California may require the plaintiff to collect and pay the tax imposed by the California Use Tax Act, and in connection therewith may require the plaintiff to conform to the regulations of the defendants in order to insure the collection and payment of said tax.

5. The court erred in concluding from the facts found that the decision in the case of Monamotor Oil Co. v. Johnson, 292 U. S. 86, is controlling in this cause.

[fols. 67-78] 6. The court erred in concluding from the facts found that the plaintiff's method of selling its comptometers to California purchasers does not entitle it to exemption from the application of the California Use Tax Act of 1935.

7. The court erred in concluding from the allegations of the plaintiff's bill of complaint, which constitute the findings of fact, that plaintiff's method of doing business includes maintaining at least two places, or any place, of business in California.

8. The court erred in concluding from the facts found that the plaintiff was maintaining any place of business in California so as to subject the plaintiff to the provisions of the California Use Tax Act of 1935.

9. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, violates the provisions of the commerce clause (Art. I, sec. 8, subd. 3) of the Constitution of the United States.

10. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, deprives the plaintiff of its property without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article I, section 13, of the Constitution of the State of California.

11. The court erred in failing to conclude that plaintiff's bill of complaint states sufficient grounds for the injunctive relief therein prayed for, when tested by a motion to dismiss the same.

Wherefore, plaintiff prays that the said decree may be reversed, and for such other and further relief as the court may deem just and proper.

Dated June 30, 1938.

Thomas R. Dempsey, A. Calder Mackay, Wellman P. Thayer, Howard W. Reynolds, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 1, 1938

To the Clerk of the Above Entitled Court:

You are hereby requested to prepare and certify a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and exhibits, to wit:

1. Bill of complaint and exhibits attached thereto, excepting all of "Exhibit B" prior to page 8.
2. Temporary restraining order and order to show cause.
3. Bond or restraining order.
4. Stipulation and order for continuance of hearing, etc. and for extension of restraining order.
5. Notice to Governor of hearing, and proof of service thereof.
6. Defendant's motion to dismiss bill.
7. Amendment to bill of complaint, with stipulation and order appended thereto.
8. Opinion.
9. Decree.
10. Petition for appeal and order allowing appeal.
11. Assignment of errors and prayer for reversal.
12. Citation on appeal, and proof of service.
13. Bond on appeal.
14. Statement as to jurisdiction of Supreme Court, (omitting copy of opinion and decree).
15. Service of appeal papers and statement directing appellees' attention to Rule 12, par. 3.

[fol. 80] 16. Praecipe for transcript of record, and proof of service thereof.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States, and to be filed in the office of the clerk of said Supreme Court, at Washington, D. C., together with the original citation, on or before the 29th day of August, 1938.

Thomas R. Dempsey, A. Calder Mackay, Wellman P. Thayer, Howard W. Reynolds, Attorneys for Plaintiff.

Service of a copy of the above praecipe is acknowledged this 1st day of July, 1938.

U. S. Webb, Attorney General of the State of California, by Walter L. Bowers, Deputy Attorney General, Counsel for Appellees.

[File endorsement omitted.]

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed August 26, 1938

Comes now Felt and Tarrant Manufacturing Co., the plaintiff and appellant in the above entitled cause, and states that the points upon which it intends to rely in this Court in this case are as follows:

1. The court erred in sustaining the motion of the defendants herein to dismiss the plaintiff's bill of complaint and cause of action and in dismissing the said bill and cause of action.

2. The court erred in denying, after due notice and hearing, the application of the plaintiff for an interlocutory injunction in said cause.

3. The court erred in concluding from the facts found, and in ordering, that the action must be dismissed, and in entering its decree against the plaintiff and in favor of the defendants, for the reason that the facts found do not support said conclusion or said decree.

4. The court erred in concluding and deciding from the facts found that the State of California may require the plaintiff to collect and pay the tax imposed by the California Use Tax Act, and in connection therewith may require the plaintiff to conform to the regulations of the defendants in order to insure the collection and payment of said tax.

[fol. 83] 5. The court erred in concluding from the facts found that the decision in the case of Monamotor Oil Co. v. Johnson, 292 U. S. 86, is controlling in this cause.

6. The court erred in concluding from the facts found that the plaintiff's method of selling its comptometers to California purchasers does not entitle it to exemption from the application of the California Use Tax Act of 1935.

7. The court erred in concluding from the allegations of the plaintiff's bill of complaint, which constitute the findings of fact, that plaintiff's method of doing business includes maintaining at least two places, or any place, of business in California.

8. The court erred in concluding from the facts found that the plaintiff was maintaining any place of business in California so as to subject the plaintiff to the provisions of the California Use Tax Act of 1935.

9. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, violates the provisions of the commerce clause (Art. I, sec. 8, subd. 3) of the Constitution of the United States.

10. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, deprives the plaintiff of its property without due process of law, in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article I, section 13, of the Constitution of the State of California.

11. The court erred in failing to conclude that plaintiff's bill of complaint states sufficient grounds for the injunctive relief therein prayed for, when tested by a motion to dismiss the same.

Appellant further states that only the following parts of the record as filed in this Court are deemed necessary to be printed for the consideration of the points set forth above, viz:

Dated August 18th, 1938.

Thomas R. Dempsey, A. Calder Mackay, Counsel for Appellant.

Due service of the within and foregoing Statement is acknowledged this 18 day of August, 1938.

U. S. Webb, Attorney General of the State of California, by Walter L. Bowers, Deputy Attorney General, Counsel for Appellees.

[fol. 85] [File endorsement omitted.]

Endorsed on cover: Enter: Thomas R. Dempsey. File No. 42,787. S. California, D. C. U. S. Term No. 302. Felt and Tarrant Manufacturing Co., appellant, vs. John C. Corbett, Fred E. Stewart, Richard E. Collins, et al., etc. Filed August 26, 1938. Term No. 302, O. T., 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 302

FELT AND TARRANT MANUFACTURING CO.,
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
WELLMAN P. THAYER,
HOWARD W. REYNOLDS,
Counsel for Appellant.

INDEX.

Subject Index.

Table of Cases Cited.

Statutes Cited.

IN THE

DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

EQUITY.

No. 1284-J

FELT AND TARRANT MANUFACTURING CO., A CORPORATION, *Plaintiff*,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, AND HARRY B. RILEY, AS MEMBERS OF THE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, AND U. S. WEBB, THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, *Defendants*.

STATEMENT OF BASIS OF JURISDICTION OF SUPREME COURT.

Pursuant to Supreme Court Rule 12, Felt and Tarrant Manufacturing Co., the plaintiff above named, upon presentation of its petition for the allowance of an appeal to the Supreme Court of the United States from the decree of the above named District Court rendered in this cause,

presents the following statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the said decree.

(a) Statutory Provision Believed to Sustain the Jurisdiction.

Judicial Code, Section 238, Subdivision 3, as amended by Act of February 13, 1925, c. 229, 43 Stat. 938 (28 U. S. C., Sec. 345), and Section 266, as amended (28 U. S. C., Sec. 380).

(b) The California Statute.

The statute of the State of California, the validity of which is involved herein, is the Use Tax Act of 1935 (Stats. 1935, Chap. 361, as amended by Stats. 1937, Chaps. 401, 671 and 683), a copy of which is appended to the bill of complaint.

The statute in question imposes an excise tax on the storage, use or other consumption in the State of California of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in said State, at the rate of 3% of the sales price of such property. Every person storing, using or otherwise consuming in said State such property purchased from a retailer is declared liable for the tax, and the liability continues until the tax is paid to the State; provided, that a receipt from a retailer maintaining a place of business in the State, or a retailer authorized by the Board of Equalization, given to the purchaser pursuant to the Act is declared sufficient to relieve the purchaser from further liability for the tax to which the receipt may refer. The tax required to be collected by the retailer is constituted a debt owed by the retailer to the State of California.

Every retailer maintaining a place of business in said State and making sales of tangible personal property for

storage, use or other consumption in said State (excepting certain exempt property, not material here) is required at the time of making such sales or, if the storage, use or other consumption of such property is not then taxable, at the time it becomes taxable, to collect the tax imposed by the Act from the purchaser and give a receipt therefor; also to file quarterly returns, in such form and showing such information as may be required by the Board of Equalization, accompanied by the amount of the tax required to be collected by the retailer during the period covered by the return. The Board is given discretionary power to require returns and payment of tax for other than quarterly periods. In the event of delinquency a penalty of 10% plus interest at the rate of ½ of 1% per month or fraction thereof is imposed.

Summary proceedings are authorized, whereby the Board may file with any county clerk a certificate specifying the delinquency, and such clerk may immediately (without any judicial proceeding) enter a judgment, an abstract or copy of which when recorded is given the force, effect and priority of a judgment lien against real property, and execution shall issue thereon at the request of the Board as in the case of other judgments.

The Board is authorized to give notice of such delinquency by registered mail to persons possessing or controlling any credits or other personal property of, or owing debts to, the delinquent, and thereafter no transfer or other disposition thereof shall be made without the consent of the Board or the lapse of twenty days. Persons so notified must within five days advise the Board of any and all such credits, personal property or debts possessed, controlled or owed by them.

The Board is granted the further power to seize and sell at public auction and convey title to any real or personal property of the delinquent, after giving notice by mail and

by publication. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax.

Every retailer selling tangible personal property for storage, use or other consumption in California (whether or not it maintains a place of business there) is commanded by the Act to register with the Board, within thirty days after the effective date of the Act, and give the name and address of all agents operating in said State, the location of any and all distribution or sales houses or offices or other places of business in said state and such other information as the Board may require; also to keep such records, receipts, invoices and other pertinent papers in such form as the Board may require.

The Act prohibits the issuance of any injunction, writ of mandate or other legal or equitable process to prevent or enjoin collection of any tax therein required to be collected; and provides but one forum for the recovery by legal action of taxes paid under protest, namely, a court of competent jurisdiction in the County of Sacramento.

The Board is charged with the enforcement of the provisions of the Act and is authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of the Act.

Ruling No. 6 of the rules and regulations under said Use Tax Act of 1935, issued by the defendant (appellee) State Board of Equalization of the State of California, effective July 1, 1935 provides as follows:

> " 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying

an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

(c) Date of Decree and of Application for Appeal.

The decree sought to be reviewed is dated April 23, 1938 and was entered April 23, 1938; and the date upon which the application for appeal is presented is June 30, 1938.

(d) Nature of the Case and of the Rulings of the Court, and Grounds for Contending Questions Involved are Substantial.

The plaintiff (appellant), Felt and Tarrant Manufacturing Co., a corporation organized and existing under the laws of the State of Illinois, brought suit against the defendants (appellees), the State Board of Equalization of the State of California, the individual members thereof and the Attorney General of said State, who are citizens and residents of the State of California, to enjoin the enforcement by the defendants of provisions of the California Use Tax Act of 1935, which, as construed, applied and sought to be enforced by the defendants, constitutes plaintiff a retailer subject to the provisions of said Act.

The bill of complaint shows that plaintiff manufactures comptometers in Illinois and sells them throughout the United States; that plaintiff is not qualified to conduct intrastate business in California and conducts none there; that all sales made by plaintiff for delivery in California are made in the course of interstate commerce, upon purchase orders accepted in Illinois and obtained by or under the supervision of two general solicitors operating on a commission basis, having exclusive territorial rights and maintaining offices in the northern and southern portions, respectively, of the State of California, but having no author-

ity to sell or contract to sell plaintiff's machines, nor to render a bill or accept payment therefor.

Plaintiff, deeming itself beyond the jurisdiction of the State of California to subject it to the provisions of said Act, by reason of the fact that all its sales of tangible personal property to purchasers within that State are transactions in interstate commerce, has not complied with said provisions.

Under date of July 23, 1937, the defendant Board notified plaintiff of a determination of use tax on sales made by plaintiff to California purchasers during the period commencing July 1, 1935, and ending June 30, 1936, with interest and penalty, in the sum of $5,294.10. Thereafter, plaintiff exhausted its administrative remedies by petitioning to said Board for a redetermination and hearing upon its claim of exemption. After a hearing the Board on October 8, 1937, redetermined the amount due in the sum of $5,338.68, plus interest at the rate of $22.29 for each month or fraction thereof after October 15, 1937, and additional penalty of $445.74 if not paid by November 14, 1937.

Suit was filed herein on November 12, 1937. Plaintiff's bill of complaint alleged facts in support of the jurisdiction of the District Court under the provisions of subdivisions 1 and 14 of Section 24 of the Judicial Code (28 U. S. C., Sec. 41, Subds. 1 and 14); and alleged that the State statute, as construed and applied by the defendants, violates the commerce clause of the Federal Constitution and deprives plaintiff of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13, of the Constitution of the State of California. Thereupon there issued a citation and a temporary restraining order and order to show cause why an interlocutory injunction should not issue. After due notice to the defendants and to the Governor of the State of California, the application for interlocutory in-

junction came on for hearing on November 27, 1937, before a three-judge court, as provided in Section 266 of the Judicial Code; the date of said hearing having been continued from November 20, 1937. At said hearing the defendants filed a return to the order to show cause, restraining order and application, and a motion to dismiss the said bill and cause upon the grounds of the insufficiency of facts, lack of jurisdictional amount, lack of Federal question, that the action is against the State of California, that the court was without jurisdiction to entertain the bill or grant the relief prayed for, that the bill does not entitle plaintiff to any relief in equity, and lack of showing of irreparable injury. The application for interlocutory injunction and the motion to dismiss were thereupon presented and argued by counsel for the respective parties and taken under submission by the court, witnout the presentation of any evidence. The application was denied and the motion to dismiss was granted. From the decree based on those rulings this appeal is taken.

The District Court in its opinion, a copy of which is appended hereto concluded that the State may require the plaintiff to collect the use tax and conform to regulations in order to insure collection thereof. The court expressed its inability to distinguish the *statute* here involved from the one upheld in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, and failed to recognize the distinction existing between the two cases by reason of the fact that Monamotor Oil Co. was extensively engaged in intrastate business in the taxing State, while in the case at bar the plaintiff had not submitted itself to the jurisdiction of the State of California, but had, on the contrary, confined its transactions there to the field of interstate commerce.

The court also concluded that plaintiff's method of doing business includes maintaining at least two places of business in California. Inasmuch, however, as the facts

show that said places of business were maintained solely for the furtherance of plaintiff's interstate commerce, it is believed that, even if they were maintained by plaintiff, instead of its district solicitors, the decision of the lower court is directly contrary to the doctrine of immunity recognized and reaffirmed in the decisions of the Supreme Court of the United States, such as *Cheney Brothers Company* v. *Massachusetts*, 246 U. S. 137; *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555; and *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203. See also, *Atlantic Lumber Co.* v. *Commissioner*, 298 U. S. 553, at page 555.

Statutes imposing a tax upon the use, storage, or consumption of tangible personal property are now common devices for raising revenue in many of the United States. The principle underlying such statutes, as applied to the user, storer or consumer, has received the sanction of the Supreme Court of the United States. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577. Innumerable retailers of such property including this plaintiff, are engaged in interstate commerce with purchasers of such property for use, storage or consumption in those states. The defendants here assert, and the District Court by its decision herein has sanctioned, the proposition that under the statute involved here they may reach beyond the confines of the State of California and subject a foreign corporation, which has not submitted itself to the jurisdiction of said State, to the duty of acting as their tax collector under pain of severe penalties and summary seizure and sale of its property within the state (including its accounts receivable) in the event of its failure or refusal so to act.

It is respectfully submitted that such a statute, so construed and applied, violates the commerce clause (Art I, Sec. 8, Subd. 3) and the due process clause of the Fourteenth Amendment of the Constitution of the United States, and that the plaintiff's bill of complaint and the action of the

District Court with respect thereto raise substantial constitutional questions which ought to be decided by the Supreme Court of the United States.

(e) Cases Believed to Sustain Jurisdiction.

Ex Parte Young, 209 U. S. 123, 167;
Sterling v. *Constantin*, 287 U. S. 378, 393-4;
Borden's Farm Products Co. v. *Baldwin*, 293 U. S. 194, 213;
G. A. F. Seelig, Inc., v. *Baldwin*, 294 U. S. 511, 520, *et seq.*

(f) The District Court Abused Its Discretion in Denying the Interlocutory Injunction.

The allegations of plaintiff's bill of complaint, which on motion to dismiss must be deemed admitted, showed that plaintiff's business within the State of California is exclusively interstate in character. There is nothing in the conclusions expressed by the District Court to indicate that it believed otherwise. The court expressed the view that plaintiff was maintaining at least two places of business in the State, and concluded therefrom that the provisions of the statute in question are applicable to plaintiff. It is plaintiff's contention that in passing upon the application for interlocutory injunction and the motion to dismiss the court should have recognized the authoritative force and effect of the decisions of the Supreme Court, hereinabove referred to, which prohibit taxation or regulation by a State of a foreign corporation which enters such State solely for the purpose of engaging in interstate commerce of a kind which does not involve the exercise of police power.

The court thought that a similarity of the statute involved in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, to the statute involved in the case at bar was sufficient justification for its action in denying to plaintiff the injunctive relief prayed for, in spite of the highly significant factual

distinction between the methods of doing business employed by the respective corporations involved in the two cases.

For these reasons it is respectfully submitted that the District Court abused its discretion in denying plaintiff's application for an interlocutory injunction. *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 213.

Inasmuch, however, as the District Court went beyond the application for interlocutory injunction, in considering the defendant's motion to dismiss, and dismissed plaintiff's bill of complaint and entire cause of action, the decree appealed from is a final disposition of the cause, in so far as it lies within the power of the District Court to make final disposition. It would seem, therefore, that this appeal may properly be treated as an appeal from a final decree, and that in such case the question of abuse of discretion in denying plaintiff's application for interlocutory injunction may be disregarded.

(g) Copy of Opinion Delivered Below.

A copy of the opinion delivered by the District Court upon rendering its decision is appended hereto. There is also appended hereto a copy of the decree made and entered in this cause.

Respectfully submitted,

THOMAS R. DEMPSEY,
A. CALDER MACKAY,
WELLMAN P. THAYER,
HOWARD W. REYNOLDS,
Attorneys for Plaintiff-Appellant.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

No. Eq-1284-J.

FELT AND TARRANT MANUFACTURING Co., a Corporation, *Plaintiff*,

vs.

JOHN C. CORBETT *et al.*, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, U. S. WEBB, the Attorney General of the State of California, *Defendants*.

Thomas R. Dempsey and A. Calder Mackay, Howard W. Reynolds, Wellman P. Thayer for plaintiff;
U. S. Webb, Attorney General, State of California, and Walter Bowers, Deputy Attorney General, for defendants.

Before U. S. Circuit Judge Albert Lee Stephens, U. S. District Judge William P. James, and U. S. District Judge H. A. Hollzer.

Plaintiff, an Illinois corporation engaged in the business of manufacturing and selling comptometers in that State for delivery to purchasers residing in various parts of the country, brings this suit to enjoin the enforcement of certain provisions, hereinafter noted, of the Use Tax Act of the State of California (Statutes 1935, Chapter 361). The defendants are members of the Board of Equalization (hereinafter referred to as the Board) and the Attorney General of said State.

Section 3 of the statute under attack provides in part that an excise tax is imposed on the storage, use or other consumption in the State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in the State at the rate of 3% of the sales price of such property.

Section 2, subdivision (b) of this act defines the word "use" as including "the exercise of any right or power over

tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business."

Subdivision (f) of the same section defines "retailer" as including "every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the Board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales in their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for the purposes of this act."

Section 3 of the same statute prescribes, in part, that every person storing, using or otherwise consuming in the State tangible personal property purchased from a retailer shall be liable for the tax imposed by the act; provided, however, that a receipt from a retailer maintaining a place of business in the State or a retailer authorized by the Board, under such rules and regulations as it may prescribe, to collect the tax imposed and who shall for the purposes of the act be regarded as a retailer maintaining a place of business in the State, given to the purchaser shall suffice to relieve the latter from further liability for the tax.

The act likewise provides that the storage, use or other consumption in the State of certain kinds of personal property is exempted from the tax, the items thus exempted consisting of property already subject to the California Retail Sales Tax Act of 1933, also motor vehicle fuel already subject to another tax, food products purchased for human consumption, property not subject to State taxation by reason of Federal or State law, and certain other items of property which for the purpose of this decision need not be enumerated.

By Section 5 of the statute every retailer selling tangible personal property for storage, use or other consumption in the State is required to register with the Board and furnish certain specified data and such other information as the Board may require.

Section 6 of the act directs every retailer maintaining a place of business in the State, and making sales of tangible personal property for storage, use or other consumption in the State not exempted under the law, to collect the tax imposed by the act from the purchaser.

Section 7 directs every retailer maintaining a place of business in the State to file quarterly returns with the Board, in such form as the latter may prescribe, showing the total sales price of the property sold, subject to the tax and also to remit with such return the amount of the tax required to be collected.

Other provisions of the statute fix penalties for failure to pay the tax within the time prescribed, also empower the Board to proceed summarily to compute and collect the tax, plus penalties and interest, also to require the retailer to keep records, etc. in such form as the Board may prescribe, such records, etc., to be subject to the Board's inspection, also prohibit the granting of injunctive relief designed to prevent the collection of the tax and limit the taxpayer to the remedy of paying the tax under protest and thereafter instituting suit for the recovery thereof in a court in the county where the State Capitol is located.

The Board has adopted various rules to enforce the provisions of the statute. By rule No. 5 it is provided that purchasers of tangible personal property the storage, use or other consumption of which is subject to the tax, should at the time of purchase of such property pay the tax to the retailer if the retailer maintains a place of business in this State and should obtain a receipt therefor from the retailer.

Rule No. 6 declares "'Place of business' means an office or other premises regularly used by a retailer for the transaction of business. Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives oc-

cupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives."

Plaintiff's method of doing business with respect to California purchasers is substantially as follows: Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to sub-agents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers.

The complaint further alleges that each of these two general agents maintains an office in this State, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As

soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the State. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California.

It further appears from the complaint that plaintiff has not collected any of the tax prescribed by the statute in question and has not filed any returns with the Board. It is further alleged that the defendants claim that there is due and owing by plaintiff to the State an amount equal to the tax imposed by said act on all machines sold by plaintiff for delivery in California during the period extending from July 1, 1935 to June 30, 1936, to-wit: the sum of $4457.42, plus interest amounting to $435.42, plus a penalty in the sum of $445.74. It is also alleged that defendants intend and threaten to and, unless restrained by order of court, will cause to be instituted summary proceedings to compel payment of the aforementioned sums; that defendants threaten to cause summary process to be issued for seizure and sale of plaintiff's property used by it solely in interstate commerce; also that defendants threaten to and will bring repeated suits against plaintiff for further amounts representing taxes which defendants claim plaintiff was required to collect from its California purchasers on sales made subsequently to June 30, 1936, together with penalties and interest thereon, thereby subjecting plaintiff to a multiplicity of suits and harassing litigation.

The complaint further alleges that the defendants demand that plaintiff register with said Board, also maintain various records and make reports to the Board from time to time and permit its records to be inspected by the Board's representatives. All of these threatened acts, unless restrained, it is alleged will cause plaintiff irreparable damage and loss.

While the complaint discloses that the suit is between citizens of different States, jurisdiction is based primarily upon

the charge that application of the statute in question to plaintiff violates Article I, Section 8, Clause 3, also Article I, Section 10, Clause 2 of the 14th Amendment of the Constitution of the United States, in that it is claimed that the requirements of the act constitute a regulation and a direct burden upon plaintiff's interstate commerce and that they deprive plaintiff of its property without due process of law. In addition, the complaint alleges that the application of the act to plaintiff is in violation of Article I, Sections 3 and 13 of the Constitution of the State of California.

A temporary restraining order and an order to show cause why an interlocutory injunction should not be granted having been issued, the defendants on the return day filed a motion to dismiss and also a return denying some of the material allegations of the bill. Following an oral argument the application for an interlocutory injunction and the motion to dismiss were ordered submitted.

The preliminary contention advanced by defendants to the effect that this suit in effect is a proceeding against the State and therefore the court lacks jurisdiction to entertain the same is disposed of by the rule announced in *Sterling* v. *Constantin*, 287 U. S. 378. In the latter case suit was instituted against the Governor and certain military officials of Texas to secure an injunction restraining them from enforcing certain military and executive orders regulating or restricting the production of oil from plaintiff's wells. In denying a similar objection as to alleged lack of jurisdiction the Court there said, (page 393):

> "The District Court had jurisdiction. The suit is not against the State. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief (citing cases). The Governor of the State, in this respect, is in no different position from that of other state officials (citing cases). Nor does the fact that it may appear that the state officer in such a case, while acting under color of state law, has exceeded the authority conferred by the state, deprive the court of jurisdiction (citing cases)."

The principal defense interposed herein is in substance that the statute under attack imposes a tax, not upon personal property while it is in transit in interstate commerce nor upon the sale thereof, but upon the privilege of use of such property after commerce is at an end, and hence the tax is not upon the operations of interstate commerce, and does not burden the same. In support of their position the defendants rely mainly on the decision rendered in *Monamotor Oil* v. *Johnson*, 292 U. S. 86. In that case suit was filed to enjoin certain officers of the State of Iowa from enforcing the provisions of the laws of that State laying a tax on motor vehicle fuel. These laws declared it to be illegal to conduct the business of a distributor of such product unless a certificate giving certain information be filed with the State Treasurer and a license be procured permitting the conduct of such business, and further required the distributor to file monthly reports with the State Treasurer showing the total number of gallons imported by him during the preceding month, with certain further details, and at the same time requiring him to remit to the Treasurer the amount of the tax. In addition, these laws defined "distributor" as "any person who brings into the State or who produces, refines, manufactures or compounds within the State any motor vehicle fuel to be used within the State or sold or otherwise disposed of by him within the State for use in the State." Likewise these laws prescribed a penalty for failure to remit the amount of the tax, also empowered the Attorney General to bring action to recover the same, authorized the State Treasurer to revoke the license of a distributor failing to comply with certain provisions, required distributors to permit inspection of their records, etc. and made it a misdemeanor for a distributor to violate any of the provisions hereinbefore mentioned.

In the case last cited the plaintiff was an Arizona corporation engaged in the business of buying, manufacturing, blending and selling gasoline and kindred products, including the importation into Iowa of gasoline by tank cars and other containers for resale to consumers and to dealers selling to consumers, and the exportation of gasoline to other states, and also in the business of maintaining storage facilities in Iowa, from which deliveries were made in that and

other states, also maintaining a refinery from which gasoline was shipped to points in Iowa and other states, and also maintaining service stations in that state which sold to consumers.

In affirming the ruling of the District Court dismissing the suit, the Supreme Court in the course of its opinion declared:

> "There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, Section 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle oil imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. (Citing cases.) It is not laid upon the importer for the privilege of importing (citing cases), but falls on the local use after interstate commerce has ended. (Citing cases.) The statute in terms imposes the tax upon motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement (citing cases.) The distributor who reports the gasoline and prays the tax is required to pass the burden on to the consumer, who is advised that in addition to the price of the gasoline he is paying a license fee to the state. To prevent evasion, the distributor must pay and pass on the tax on all gasoline imported or distributed, irrespective of its ultimate use; * * * Since the law declares that the levy is only upon use of motor vehicle fuel in the state, and the intent is not to affect interstate commerce, the state treasurer properly permits distributors to deduct as a credit * * * that which has been exported from the state by the distributor. * * *. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come

to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the State, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant.

"The method of imposition and collection of the tax does not deny the equal protection guaranteed by the XIV Amendment * * *. The short answer to the contention is that the statutes properly construed lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does."

In a more recent decision, *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, the Supreme Court, upholding the validity of certain legislation enacted by the State of Washington, consisting of a statute levying a tax on retail sales and a statute imposing a compensating tax upon the privilege of using personal property in the state, declared:

"The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?

The tax is not upon the operations of interstate commerce but upon the privilege of use after commerce is at an end. Things acquired or transported

> in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. (citing cases). This is so, indeed though they are still in the original packages. (citing cases). For like reasons they may be subjected, when once they are at rest to a non-discriminatory tax upon use or enjoyment (citing cases, including *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86, 93) * * *. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate (citing cases)."

In *Bowman* v. *Continental Oil Co.*, 256 U. S. 642, while sustaining a decree enjoining the enforcement of a license tax levied against concerns engaged in the business of importing oil and gasoline products from other states and distributing the same in New Mexico, and also enjoining the enforcement of an excise tax upon the sale of such property in that State in the original form and condition as when imported (but not upon the sale of such products in broken packages), the Supreme Court held that such decree should be "without prejudice to the right of the State through appellants or other officers, to require plaintiff to render detailed statements of all gasoline received, sold or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

These decisions make it clear that a State law, such as the one here under attack, in so far as it imposes a use tax upon personal property after the same has been brought into the State, does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution.

Accordingly, there remains for consideration only the question whether the State may require the seller to collect such tax and in connection therewith require the latter to conform to certain regulations in order to insure the collection of the tax.

We think this question must be answered in the affirmative. In this respect, we are unable to distinguish the statute here involved from the one upheld in the case of *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86. Nor are we able to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute. The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California.

For the reasons herein set forth we conclude that this action must be dismissed and it is so ordered.

Dated this 11th day of January, 1938.

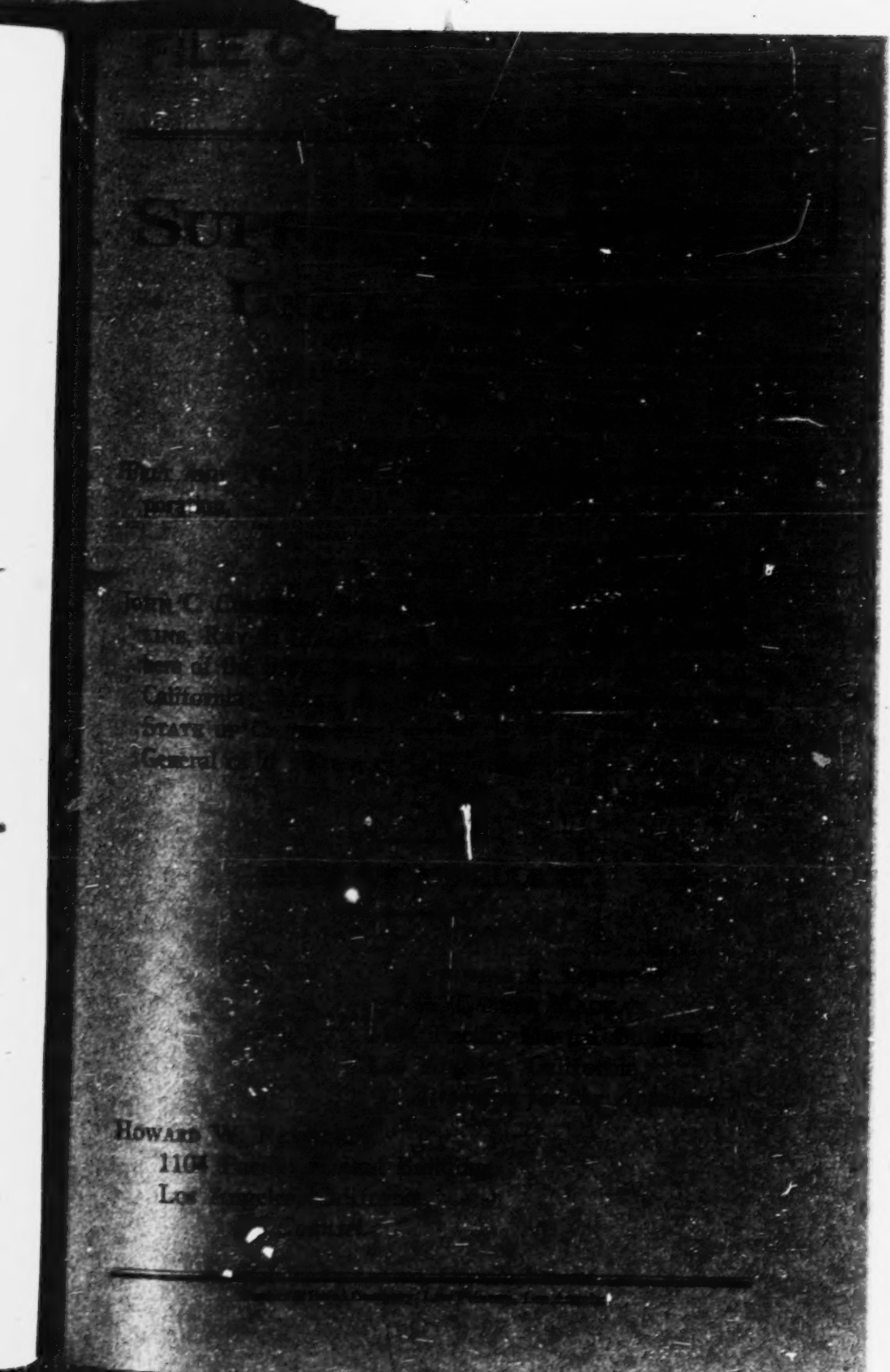
H. A. HOLLZER,
U. S. District Judge.

We Concur:

ALBERT LEE STEPHENS,
U. S. Circuit Judge.

WM. P. JAMES,
U. S. District Judge.

Endorsed: Filed Jan. 13, 1938. R. S. Zimmerman, Clerk, by Murray E. Wire, Deputy Clerk.



SUBJECT INDEX.

INDEX TO APPENDIX.

TABLE OF AUTHORITIES CITED.

STATUTES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 302.

FELT AND TARRANT MANUFACTURING COMPANY, a corporation,

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, and HARRY B. RILEY, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLANT.

I.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the District Court of the United States for the Southern District of California, Central Division, from the decree of which court this appeal is taken, is reported in 23 F. Supp. 186.

II.

JURISDICTION.

Probable jurisdiction was noted by this Court on October 10, 1938.

III.

STATEMENT OF THE CASE.

(a) Decree Below.

Appellant filed a bill in the District Court seeking a decree that the California Use Tax Act of 1935 (Cal. Stats. 1935, c. 361, as amended by Cal. Stats. 1937, c. 401, 671 and 683), violates state and federal constitutional provisions, and an injunction prohibiting its enforcement against appellant. A temporary restraining order issued, but a court of three judges, after a hearing on the application for an interlocutory injunction and the motion of the appellees to dismiss, dismissed the suit. The case is before the Supreme Court on direct appeal from the decree of dismissal.

(b) Questions Involved.

The principal questions involved in this appeal may be summarized as follows:

1. Where a foreign corporation has not qualified to transact intrastate business in a state and has not transacted such business there so as to subject it to the state's jurisdiction, and in such state is engaged solely in selling goods in interstate commerce to purchasers within such state, can the state lawfully require the corporation, in connection with such sales in interstate commerce, to collect and pay to the state a tax, imposed by the state upon use,

storage, or consumption of the goods within the state which can arise only after the goods have left the seller's possession and the interstate transaction is completed?

2. Will the enforcement of the state statute by the appellees in the manner threatened deprive the appellant of its property without due process of law?

(c) Summary of Statute Involved.

The pertinent portions of the statute are printed in the appendix hereto annexed. Various terms and phrases used in the Act are defined in section 2. Included among these is the word "retailer." [R. 29-31]

Section 3 imposes an excise tax on the storage, use or other consumption in California of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in said state, at the rate of 3% of the sales price of such property. Every person storing, using or otherwise consuming in said state such property so purchased is liable for the tax until it is paid to the state; provided that a receipt from a retailer maintaining a place of business in said state or authorized by the State Board of Equalization (referred to as the Board) given to the purchaser pursuant to the Act shall be sufficient to relieve the purchaser from further liability for the tax covered by the receipt. [R. 31-32]

Section 4 specifically exempts the storage, use or consumption of various classes of tangible personal property, including, among others, (a) property, the gross receipts from the sale of which are subject to chapter 1020, Statutes of 1933 (the California Retail Sales Tax Act of 1933) and any amendments thereto; and (b) property, the storage, use or other consumption of which the state is

prohibited from taxing under the Constitution or laws of the United States or under the Constitution of California: and the exemption specified in section 47 relates to certain vessels. [R. 32-34]

Every retailer selling tangible personal property for storage, use or other consumption in California is required to register with the Board within thirty days after the effective date of the Act and give the name and address of all agents operating in the state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Board may require. [Section 5, R. 34]

Every retailer maintaining a place of business in such state and making non-exempt sales of such property shall at the time of making such sales or, if the storage, use or other consumption of such property is not then taxable, at the time it becomes taxable under the Act, collect the tax from the purchaser and give a receipt therefor; and the tax so required to be collected by the retailer shall constitute a debt owed by the retailer to the state. [Section 6, R. 34]

Every retailer maintaining a place of business in the state is required by section 7 to file with the Board quarterly returns in such form and showing such information as may be required by the Board, accompanied by the amount of the tax required to be collected by the retailer during the period covered by the return. The Board is given discretionary power to require returns and payment of taxes for other than quarterly periods. Every person purchasing property, the storage, use or consumption of which is subject to the tax and who has not paid the tax to a retailer required or authorized to collect the tax, must

file with the Board a return accompanied by a remittance of the amount of tax imposed and not paid to a retailer. [R. 35]

Section 8 provides that in the event of delinquency in payment a penalty of 10% thereof plus interest at the rate of ½ of 1% per month or fraction thereof shall become due and payable to the state. [R. 37]

Additional determinations, arbitrary determinations and jeopardy determinations are provided for by sections 9, 10 and 11, respectively. [R. 37-39] Redetermination of amounts determined under sections 9 or 10, and procedure with respect thereto are treated in section 12. [R. 39-40]

By section 14 the Board is empowered to require the deposit with it of such security as it may determine, and to sell the same, after notice of sale served on the depositor personally or by mail. [R. 40]

Summary proceedings are authorized whereby the Board may file with any county clerk a certificate specifying a delinquency, and such clerk shall immediately thereupon enter a judgment, an abstract or copy of which when recorded is given the force, effect and priority of a judgment lien against real property; and execution shall issue thereon at the request of the Board as in the case of other judgments. The Board is authorized to give notice of delinquency by registered mail to persons possessing or controlling any credits or other personal property of, or owing debts to, the delinquent; and thereafter no transfer or other disposition thereof shall be made without the Board's consent or the lapse of twenty days. Persons so notified must within five days advise the Board of any and all such credits, personal property or debts possessed, controlled or owed by them. The Board is granted the further power

to seize and sell at public auction and convey title to any property of the delinquent, after giving notice by mail and by publication. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. [Section 20, R. 43-46]

Section 21 provides that every retailer shall keep such records, receipts, invoices and other pertinent papers in such form as the Board may require, and authorizes the examination thereof by the Board and its agents. [R. 46]

Section 23 relates to the disposition of amounts paid to the Board. [R. 47]

Section 24 requires that the State Attorney General prosecute actions to recover delinquent amounts due under the Act, with penalties and interest, and provides that in any action brought under the provisions of the Act, process may be served according to the provisions of the Code of Civil Procedure, and the Civil Code of the state, "or may be served upon any agent or clerk in this state employed by any retailer in a place of business maintained by such retailer in this state, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office." [R. 48-49]

Section 25 forbids the issuance of any injunction, writ of mandate or other process to prevent or enjoin collection of any tax therein required to be collected, and provides but one forum for the recovery by legal action of taxes paid under protest, namely, a court of competent jurisdiction in the County of Sacramento. [R. 49-50]

Section 26. relates to penalties and makes failure or refusal to furnish any return required by the Act, or to

furnish a supplemental return or other data required by the Board, a misdemeanor punishable by a fine of not exceeding $500 for each offense. [R. 50]

The Board is charged (Section 21) with the enforcement of the provisions of the Act and is empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement thereof. [R. 46]

Ruling No. 6 of the rules and regulations under said Act, issued by the Board, effective July 1, 1935, provides:

> "'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives." [R. 14]

(d) Appellant's Operations.

Appellant is an Illinois corporation engaged in manufacturing comptometers at Chicago, Illinois, and selling them throughout the United States. [R. 4] It has not engaged in, nor qualified for the transaction of, intrastate business in the State of California. [R. 6]

The method employed by appellant in making sales of its product to California purchasers follows the usual pattern for transactions in interstate commerce. [R. 4-6] Orders for goods are solicited by or under the direction of two territorial agents, having exclusive soliciting rights in

the northern and southern portions, respectively, of the State of California. These agents receive no salary, but are paid commissions based on sales made by appellant pursuant to orders solicited by them and their employees. Each of the two agents maintains an office within his allotted territory, for the convenience of himself and his employees. Appellant is the lessee of said offices and pays the rental thereof. All other expenses of maintaining said offices are paid by the respective agents who occupy them. [R. 4-5]

Each order for appellant's product obtained by either of said agents is forwarded to appellant's head office at Chicago, Illinois, where, if it meets with the approval of appellant's officers, it is accepted and delivered to appellant's shipping department. The shipping department then appropriates a machine to the order and notes on the order the number of the machine so appropriated; and a memorandum is sent to the general agent who forwarded the order, setting forth descriptive details of the machine, the date of shipment and the name of the purchaser. [R. 5]

All machines sold for delivery in California are shipped either from appellant's Chicago plant or from one of its other distributing points without the State of California. Machines are shipped either directly to the purchaser or, in order to secure reduced freight rates, in group shipments to the general agents, who make delivery thereof to the respective purchasers, whose names appear on tags attached thereto prior to shipment. [R. 5]

Approximately seven days after a machine is shipped from Chicago a bill therefor is sent from appellant's Chicago office directly to the purchaser, who is instructed to make payment directly to appellant in Chicago. Neither the general agents nor their subagents have any authority to make a direct sale of appellant's machines, or to enter into a contract binding plaintiff to sell one, or to render a bill for a machine, or to accept payment for a machine. Appellant keeps no machines in California for sale. [R. 6, 23-28]

During the entire period from July 1, 1935 to the date of the commencement of suit herein all sales of appellant's machines to purchasers for storage, use or other consumption in California were made in the manner aforesaid. [R. 6] Appellant has not collected any tax from its California customers, nor has it filed any use tax returns with the appellee Board. [R. 15]

(e) Proceedings Prior to Decree Below.

Under date of July 23, 1937 the appellee Board notified appellant of a determination of use tax on sales made by appellant to California purchasers during the one-year period commencing July 1, 1935, in the sum of $4,457.42, plus interest in the sum of $390.94 and penalties in the sum of $445.74. Thereupon in due course the appellant exhausted the administrative remedies available under the terms of the statute, by filing and prosecuting before the Board a petition for redetermination. After a hearing the Board on October 8, 1937 redetermined the amount due, in the sum of $5,338.68, with interest at the rate of

$22.29 for each month or fraction thereof after October 15, 1937, and an additional penalty of $445.74 if not paid by November 14, 1937. [R. 57]

Suit herein was commenced on November 12, 1937. Appellant alleged facts in support of the jurisdiction of the District Court under subdivisions 1 and 14, respectively, of Section 24 of the Judicial Code. (28 U. S. C. A. Sec. 41, subds. 1 and 14), [R. 3, 63] and asserted that the state statute as construed and applied by the appellees constitutes a regulation of and a direct burden upon interstate commerce, in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, and deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Section 13 of Article I of the Constitution of the State of California. [R. 3, 17]

The District Court issued a temporary restraining order and order to show cause why an interlocutory injunction should not be granted according to the prayer of the bill of complaint. [R. 52, 63] After due notice to the appellees and the Governor of California, [R. 54] the application for interlocutory injunction was heard before a three-judge court pursuant to Section 266 of the Judicial Code, 28 U. S. C. A. Sec. 380. At that hearing the appellees filed a return to the order to show cause, restraining order and application, and a motion to dismiss the bill of complaint and cause upon the grounds that there was insufficiency of facts, lack of jurisdictional amount, lack of a Federal question; that the action is against the State of California; that the court was without jurisdiction to en-

tertain the bill or grant the relief sought; that the bill does not entitle plaintiff (appellant) to any relief in equity, and a lack of showing of irreparable injury. [R. 55]

The application for interlocutory injunction and the motion to dismiss were presented and argued by counsel for the respective parties and taken under submission by the District Court, without the presentation of any evidence and without consideration of any issues raised by the appellees' return. [R. 63]

Appellant's application for an interlocutory injunction was denied, and appellees' motion to dismiss was granted. [R. 69] The opinion of the court below [R. 58-68] shows that the court's action was based upon its conclusion that the statute under consideration does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution and that the state may require the appellant as seller to collect the use tax and in connection therewith require the seller to conform to certain regulations in order to insure collection of the tax. The appeal herein is taken from the decree based on those rulings of the District Court. [R. 70]

The effect of the lower court's decision is to hold that, in spite of the fact that appellant is a foreign corporation and that its business in California is exclusively interstate in character, California may nevertheless impose upon the appellant all of the burdens and duties prescribed by the state statute for retailers, including the duty of collecting from the appellant's California customers and paying to the state the use tax which those customers owe to the state, and in that connection may compel the appellant to conform to other provisions and regulations in order to insure the state's collection of the tax.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The assigned errors intended to be urged upon this appeal are:

1. The court erred in sustaining the motion of the defendants herein to dismiss the plaintiff's bill of complaint and cause of action and in dismissing the said bill and cause of action.

2. The court erred in denying, after due notice and hearing, the application of the plaintiff for an interlocutory injunction in said cause.

3. The court erred in concluding from the facts found, and in ordering, that the action must be dismissed, and in entering its decree against the plaintiff and in favor of the defendants; for the reason that the facts found do not support said conclusion or said decree.

4. The court erred in concluding and deciding from the facts found that the State of California may require the plaintiff to collect and pay the tax imposed by the California Use Tax Act, and in connection therewith may require the plaintiff to conform to the regulations of the defendants in order to insure the collection and payment of said tax.

5. The court erred in concluding from the facts found that the decision in the case of *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, is controlling in this cause.

6. The court erred in concluding from the facts found that the plaintiff's method of selling its comptometers to California purchasers does not entitle it to exemption from the application of the California Use Tax Act of 1935.

7. The court erred in concluding from the allegations of the plaintiff's bill of complaint, which constitute the findings of fact, that plaintiff's method of doing business includes maintaining at least two places, or any place, of business in California.

8. The court erred in concluding from the facts found that the plaintiff was maintaining any place of business in California so as to subject the plaintiff to the provisions of the California Use Tax Act of 1935.

9. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, violates the provisions of the commerce clause (Art. 1, sec. 8, subd. 3) of the Constitution of the United States.

10. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, deprives the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 13, of the Constitution of the State of California.

11. The court erred in failing to conclude that plaintiff's bill of complaint states sufficient grounds for the injunctive relief therein prayed for, when tested by a motion to dismiss the same.

The foregoing assignments of error are reducible to two main propositions, namely: (1) The state statute as construed and applied by the appellees to the appellant is repugnant to clause 3 of section 8, Article I, commonly known as the "commerce clause," of the Constitution of the

United States; and (2) The threatened enforcement by the appellees of the provisions of said statute would deprive the appellant of its property without due process of law, in violation of the Fourteenth Amendment of said Constitution.

V.

SUMMARY OF ARGUMENT.

The three cases upon which the lower court relied as authority for the denial of the injunctive relief sought by the appellant herein are not applicable to the case at bar. In each of those cases the corporation subjected to the tax was within the jurisdiction of the taxing state and was transacting an intrastate business there. The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as the appellant transacts in California is interstate in character. California, therefore, lacks the power to require the appellant (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collection from the tax debtors, or (3) otherwise to act as a "retailer" as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce and as such is prohibited by the Constitution. Numerous provisions of the statute, if applied to the appellant, would deprive it of its property without due process of law. The action of the lower court in denying injunctive relief to the appellant therefore was erroneous.

VI.

ARGUMENT.

POINT I.

This Case is Distinguishable on its Facts From, and is Not Governed by, the Cases Relied Upon by the Lower Court in Denying the Relief Sought by the Appellant.

The decision of the lower court is based upon the court's expressed inability "to distinguish the statute here involved from the one upheld in the case of *Monamotor Oil Co. v. Johnson,* 292 U. S. 86," and its further inability "to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute," and, finally, upon its conclusion, from the allegations of the bill, "that plaintiff's method of doing business includes maintaining at least two places of business in California." [R. 67-68].

The opinion of the lower court reveals that, in deciding against the appellant, that court relied entirely upon three decisions by the Supreme Court of the United States, namely: *Henneford v. Silas Mason Co.,* 300 U. S. 577; *Bowman v. Continental Oil Co.,* 256 U. S. 642, and *Monamotor Oil Co. v. Johnson,* 292 U. S. 86.

After discussion of those three decisions, the opinion below proceeds to state [R. 67]:

> "These decisions make it clear that a State law, such as the one here under attack, in so far as it imposes a use tax upon personal property after the same has been brought into the State, does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution."

The statement itself is not clear. Section 6 of the statute in question by its terms imposes an excise tax "on the storage, use or other consumption * * * of tangible personal property," rather than on the property itself. Furthermore, the statement wholly ignores the factor of jurisdiction of the taxing state over some definite and tangible taxpayer.

None of those three cases involved the question, here presented, of the right of a state to regulate or burden the interstate commerce of a party which had not submitted itself to the jurisdiction of such state, and whose activities in such state are confined to interstate commerce.

In the case first referred to, Silas Mason Co., while engaged in intrastate business in the State of Washington, used personal property, which had been bought at retail in other states "long after the time when delivery was over," (p. 583). That case involved the right of the state to enforce the provisions of its use tax law against those who *use* personal property *after* it has become part of the common mass of property within the state of destination, even though it was acquired in interstate commerce. One of the cases there cited in support of that principle is *Monamotor Oil Co. v. Johnson*, 292 U. S. 86. However, that question is not here involved.

The tax can not attach until the interstate transaction, whereby the goods are introduced into the State of California, has come to an end. If thereafter a purchaser stores, uses or consumes the goods within the state such

storer, user or consumer becomes liable to the state for the use tax imposed by the statute in question, and is required to file a return and pay the tax, if it has not already been paid to a retailer. The appellant does not dispute the right of the appellees to collect the tax from such storer, user or consumer. It does, however, emphatically dispute their right to compel the appellant to serve as their collection agent and otherwise perform the duties to which retailers *within the jurisdiction of the state* are subjected.

In neither *Bowman v. Continental Oil Co.*, 256 U. S. 642, nor *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 was the corporation carrying on an exclusively interstate business in the state whose statute was under consideration. In the opinion rendered in each of those cases it clearly appears that the corporation involved was carrying on intrastate business which subjected it to the jurisdiction of the state in which such business was carried on. The opinion of the lower court in the *Monamotor Oil Co.* case, reported in 3 Fed. Supp. 189, which was approved by the Supreme Court, reveals a factual background readily distinguishable from that in the case at bar. At page 199 of that opinion the lower court said:

> "Upon consideration of the entire act the intention of the Legislature is readily apparent: First, a levy is made upon all motor vehicle fuel used or consumed in the state; second, the person or persons using the fuel within the state are made liable for the payment of the fees; third, a refund is granted to users of such motor vehicle fuel other

than users on the public highways; and, fourth, the distributor *for the privilege of selling and dispensing of gasoline within the state of Iowa* is to be a toll collector and administer the collection of the tax making his reports as required by section 5093-a5, and in either paying or advancing the tax on the 20th day of the month following that on which the gasoline was imported and unloaded by him."

* * * * * * * * *

"A distributor of gasoline has no inherent rights to sell and dispense gasoline *in the State of Iowa* and, on account of the nature of the product that he handles, the state has a right to require of him *in consideration of his right to dispense gasoline within the state* the administrative acts as provided by the statutes. * * *" (Emphasis supplied.)

That language clearly relates to the power of a state over a person *acting within its boraers* and with respect to an article which is properly the subject of the exercise of the police power. Any doubt that the District Court and the Supreme Court in the *Monamotor Oil Co.* case were not dealing with a question of interstate commerce is dissipated by paragraph XI of the findings made by said District Court, which appears on page 109 of the record in the Supreme Court and is as follows:

"XI. That *as a part of the business conducted in Iowa* by said Mona Motor Oil Company, *said Company imports into Iowa from other States* in tank cars and other containers and by tank trucks said gasoline and delivers the same to certain other distributors and dealers in the State of Iowa. *That said importation of gasoline is a part of the general business regularly conducted by the Mona Motor Oil Company in the State of Iowa. That the sales*

> *are made in Iowa* and is what is commonly termed a jobbing business of gasoline whereby the Mona Motor Oil Company supplies other distributors and dealers with gasoline in wholesale quantities shipped from points outside of the State of Iowa and that such business is now being conducted by the Mona Motor Oil Company in the State of Iowa and amounts to many thousand dollars per month." (Emphasis supplied.)

The cases cited by the Supreme Court, at page 94 of its opinion in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, clearly relate to intrastate transactions, in which jurisdiction of the state to regulate was present. The court stated, furthermore, (p. 94) that:

> "The intent is not to affect interstate commerce,"

and (p. 95):

> "The statute obviously was not intended to reach transactions in interstate commerce."

See also,

> *Iowa v. Standard Oil Co.*, ... Iowa ..... 271 N. W. 185:
>
> *Iowa v. Phillips Pet. Co.* ..... Iowa ..... 271 N. W. 192. (Appeal dismissed for want of substantial Federal question, 302 U. S. 646) involving the same statute as that under consideration in *Monamotor Oil Co. v. Johnson*, ***supra.***

It is respectfully submitted that, to the extent that the portion of the affirming opinion in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, which was quoted by the lower court herein, may superficially appear to extend the scope of the decision in that case so as to include a shipper,

who is beyond the state's jurisdiction, as an agent of such state, then to that extent it must be regarded as *obiter dictum* which is ineffective to overrule the great mass of authority which denies to a state extraterritorial jurisdiction, as well as the power to regulate or burden interstate commerce.

There appears to be nothing in the language quoted by the lower court from *Bowman v. Continental Oil Co.*, 256 U. S. 642, to justify its application to the interstate transactions of a corporation which has not submitted itself to the state's jurisdiction, either by qualifying for or engaging in intrastate business within such state. That language indicates merely that a corporation, having submitted itself to a state's jurisdiction and conducted extensive intrastate activities therein, may be compelled to furnish the information necessary to segregate, for excise taxation purposes, such intrastate business from its interstate business, which latter was definitely and expressly recognized as being beyond the state's power to tax.

That this vital distinction was not recognized by the court below is apparent from the closing lines of its opinion. It is noteworthy that the court stated that it was unable to distinguish the *statute* here involved from the one involved in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86. Similarity of the statutes alone cannot be a sufficient basis for regarding that case as controlling the decision in the case at bar. Even if the statutes are similar, it is obvious that their application to dissimilar facts does not require similar results. Especially, is this true in any case, such as the one at bar, where such results could be reached only by overturning a vast body of deep-rooted constitutional law.

POINT II.

THE CALIFORNIA USE TAX ACT AND THE PROCEEDINGS OF THE APPELLEES UNDER IT, AGAINST THE ENFORCEMENT OF WHICH INJUNCTIVE RELIEF IS SOUGHT, ARE IN DIRECT CONFLICT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION.

The lower court, as a further ground for its decision, expressed its inability to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of the statute here involved.

The lower court's conception of the scope and applicability of the three cases hereinabove referred to, and particularly *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, appears very definitely to have constituted the cause of the asserted failure of perception,—rather than any lack of showing of facts in the present case.

The District Court expressed no hesitancy or doubt as to the jurisdictional showing made by the appellant. Its decision is bottomed upon the proposition that *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, compels the conclusion that no unconstitutional regulation of interstate commerce results from the facts shown in this case.

The facts stated in the complaint are deemed admitted upon the appellees' motion to dismiss. *Askren v. Continental Oil Co.*, 252 U. S. 444, 448, and must be taken as

the findings of fact required by Equity Rule 70½, 28 U. S. C. A. following Sec. 723.

Cottman v. Dailey, 20 F. Supp. 142, 145. Certiorari denied 289 U. S. 750;

Grandin Farmers' etc. Co. v. Langer, 5 F. Supp. 425, affirmed 292 U. S. 605.

See, also,

Baltimore & Ohio R. Co. v. U. S. A., 264 U. S. 258, 262-3.

They were so taken and adopted by the decree of the lower court. From them it is apparent that all sales made by the appellant to California purchasers constitute interstate commerce in its essence.

Sonneborn Bros v. Keeling, 262 U. S. 506, 515;

Real Silk Hosiery Mills v. Portland, 268 U. S. 325;

Carter v. Carter Coal Co., 298 U. S. 238, 303;

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147;

Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489;

Charlton Silk Co. v. Jones, 190 Cal. 341, 212 Pac. 203;

Palmer v. Aeolian Co. (C. C. A. 8), 46 F. (2d) 746. Certiorari denied, 283 U. S. 851.

The essential interstate nature of such sales is not destroyed by the fact that the orders upon which the sales are based are solicited by persons stationed or residing in

California, nor by the fact that such solicitors occupy offices within that state under the conditions herein found.

Paramount Pictures Dist. Co. v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385, Cert. den. 298 U. S. 665;

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147;

Sonneborn Bros. v. Keeling, 262 U. S. 506;

Ozark Pipe Line Co. v. Monier, 266 U. S. 555;

McCall v. California, 136 U. S. 104, 112;

Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114.

Nor is their essential nature as interstate commerce destroyed by reason of the fact that in some instances, in order to effect freight economies goods may be combined and shipped to one of the appellant's representatives in California for delivery to the purchasers, instead of being shipped directly to each individual purchaser.

Davis v. Virginia, 236 U. S. 697;

Crenshaw v. Arkansas, 227 U. S. 389;

Dozier v. Alabama, 218 U. S. 124;

Rearick v. Pennsylvania, 203 U. S. 507;

Calawell v. North Carolina, 187 U. S. 622;

N. L. R. B. v. National etc. Co., 86 Fed. (2d) 98, 99.

Arrangements made between seller and purchaser with respect to the place of taking title or as to payment of

freight, where the actual movement is interstate, do not affect the power of Congress to regulate interstate commerce.

Santa Cruz etc. Co. v. N. L. R. B., 303 U. S. 453, 82 L. ed. 653, 656;

Pennsylvania R. Co. v. Clark Bros. Co., 238 U. S. 456, 466.

The states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it, or upon persons or property in transit in interstate commerce. They have no power to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on.

Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 400-401.

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." (Citing cases.)

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 291.

"It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business."

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218.

See, also,

Anglo-Chilean etc. Corp. v. Alabama, 288 U. S. 218.

It is the established doctrine of the Supreme Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate commerce.

International Textbook Co. v. Pigg, 217 U. S. 91;

Helson v. Kentucky, 279 U. S. 245;

Baldwin v. G. A. F. Seelig Inc., 294 U. S. 511.

In *Helson v. Kentucky, supra,* the court said (pp. 248-9):

> "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation *or otherwise*, constitutes a regulation beyond the power of the state under the Constitution." (Emphasis supplied.)

The burden laid on interstate commerce by a tax is deemed direct where the tax lays a burden upon every transaction in such commerce by withholding for the use of the state a part of every dollar received in such transaction. That such is the law is admitted in the dissenting opinion in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297.

It follows that the exaction from the appellant, for the use of the state of California, of three cents of every dollar representing the purchase price of goods sold by the appellant in interstate commerce with California customers, is a direct burden on such interstate commerce.

In *Henneford v. Silas Mason Co.*, 300 U. S. 577, there is a clear recognition in the majority opinion that there are limits beyond which a state may not encroach in the administration of its use tax statutes. For example, it is stated (p. 583):

> "* * * A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

A fortiori, the incidence of the tax cannot lawfully precede the termination of the interstate journey.

Again, after holding (p. 583) that in that case the tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them, the court states (p. 586):

> "* * * A tariff whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether protection or revenue is the motive back of it."

There, also (pp. 585-586) Mr. Justice Cardozo distinguished that case from *Baldwin v. Seelig*, 294 U. S. 511, pointing out that in the latter case:

> "* * * New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here."

By the same token, California through the appellees has said to the appellant:

> "Your comptometers cannot be sold by you in Illinois to purchasers in California unless you act as collector of our use tax, register as a retailer, and as such comport yourself in accordance with such rules and regulations as we may in our discretion deem 'necessary for the efficient administration of this act.'"

By such registration the appellant would become personally liable in debt to the state for the payment of use taxes levied upon machines shipped into the state from outside points.

> *Endrezze v. Dorr Co.* (C. C. A. 9) 97 Fed. (2d) 46, 48.

Furthermore, the statute, as administered by the appellees, compels the appellant to insure payment of the use tax owed by its California customers; and places the burden of the tax on the appellant if and to the extent that it fails to obtain payment from such customers.

In *Baldwin v. Seelig,* 294 U. S. 511, the court observed (p. 522) that nice distinctions between direct and indirect burdens are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

A use tax or compensating tax is designed to reach purchasers who acquire personal property in other states for use at home.

> *Henneford v. Silas Mason Co.,* 300 U. S. 577, 581.

It is settled that the generality and nondiscriminatory character of a tax will not save it if it directly burdens interstate commerce.

J. D. Adams Mfg. Co. v. Storen, 82 L. ed. 870, 873.

State statutes levying taxes or license fees are not the only ones which have been condemned for violation of the commerce clause of the Federal Constitution. Following are illustrations of other types of unlawful burdens on interstate commerce:

(a) A statute requiring a foreign corporation engaged in interstate commerce as a condition to doing business in the state to file a detailed statement of financial condition with the Secretary of State.

Buck's Stove & Range Co. v. Vickers, 226 U. S. 205;

International Textbook Co. v. Pigg, 217 U. S. 91.

(b) A statute requiring a foreign corporation engaged in interstate commerce to file a certificate designating a principal place of business within the state and appointing resident agents.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

(c) A statute requiring a foreign corporation, as a condition precedent to its right to sue in the state courts, to appoint a resident agent and file a copy of its charter with the Secretary of State.

Sioux Remedy Co. v. Cope, 235 U. S. 197.

(d) A statute requiring that an interstate carrier, in order to avail itself of a contract right of exemption from liability, must trace the freight and inform the shipper in writing when, where, how and by what carrier the freight was lost or damaged, and give the names and positions of the persons by whom the truth of such information can be established.

Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194.

Consider then, in the light of the foregoing decisions, the following requirements of the statute, as construed and threatened to be applied by the appellees to the appellant:

The appellant must:

Register with the Board of Equalization, furnish the information specified in section 5 of the Act and give such other information as the Board may require.

Determine whether or not and when, if ever, the storage, use or other consumption of the property, which it sells in Illinois and ships into California, becomes taxable under the Act; and, when it becomes taxable, collect the tax and give the purchaser a receipt therefor.

File returns quarterly, or otherwise as the Board may require, showing the sales price of property sold, the storage, use or consumption of which became subject to the tax imposed by said Act during the preceding taxable period.

Be subject to penalties and interest, in the event of failure to obey the statute (Section 8); and arbitrary determinations of tax (Section 9); and criminal charges (Sections 26 and 27).

Be subject to the requirement of such security for payment of tax as the Board may determine, and to the sale of such security.

Be subject to summary judgment and execution, without suit or service of process. (Section 20.)

Be subject to the risk of loss of the unsold portion of any property seized and left at the place of sale. (Section 20.)

It should be noted that the maintenance of a place of business in California is not a prerequisite to some of the aforesaid forms of regulation.

The aforesaid burdens seem to be as objectionable as those condemned by the decisions of this Honorable Court, hereinabove cited. But the provisions of section 6 of the Act, in particular, reveal a practical difficulty,—with respect to ascertaining the time of the accrual of the tax,—which a foreign corporation, such as the appellant is here shown to be, cannot meet except by the expenditure of much time and money. Obviously, the tax cannot accrue until some time after the interstate transaction is completed. To compel an Illinois seller to follow up each sale to a California purchaser, after the goods have been delivered, in order to ascertain whether that purchaser is storing, using or consuming them in a manner which calls for the incidence of the tax, would require a legal and accounting staff of extremely burdensome proportions.

The lower court's decree is further expressly based upon the conclusion that the appellant's method of doing business includes maintaining at least two places of business in California.

This conclusion accepts as valid the phraseology of Ruling No. 6 of the appellee Board of Equalization, which reads:

> " 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives." [R. 14]

Thus the statute, as interpreted by the appellees and the lower court, sweeps within its purview all persons and corporations, regardless of their actual absence from the state, and makes them amenable to the state for the purposes of taxation and regulation if orders are solicited in this state by an agent or representative occupying an office or other premises in the state.

Such an interpretation cannot be reconciled with the interpretation of the commerce clause of the Federal Constitution which has consistently been sustained by the courts of this country.

An analogous situation has frequently arisen in patent infringement cases, where the question of jurisdiction over a nonresident defendant depended on whether the defendant had a "regular or established place of business" within the district. These cases hold that the presence of order solicitors engaged in interstate commerce in a state and the furnishing of office facilities for such

solicitors do not create for the foreign principal of such solicitors the status of having a regular or established place of business.

W. S. Tyler Co. v. Ludlow Saylor Wire Co., 236 U. S. 723;

American etc. Co. v. Lalance etc. Co., 256 Fed. 34;

Root v. Samuel Cupples Env. Co., 36 Fed. (2d) 405;

Elevator Supplies Co. v. Wagner Mfg. Co., 54 Fed. (2d) 937;

Remington Rand v. Acme Card System Co., 71 Fed. (2d) 628;

American Sales Book Co. v. Atlantic Reg. Co., 14 Fed. Supp. 623.

The applicability of those cases to a situation which does not involve patent infringement clearly appears from *Davega, Inc., v. Lincoln Furniture Mfg. Co., Inc.* (C. C. A. 2), 29 Fed. (2d) 164. That case involved the question of sufficiency of service of process in New York upon the officer of a Virginia corporation who was temporarily in New York. In affirming the dismissal of the action the court stated (p. 166):

> "* * * It has been definitely determined that the mere renting of an office and solicitation of business in the foreign state is insufficient to subject the corporation to service of process."

and cited, *inter alia*, the case of *W. S. Tyler Co. v. Ludlow-Saylor Wire Co., supra*. Thereupon the court added:

> "* * * Nor is the fact (if it be the fact, which is disputed) that the cause of action here arose in New York material, unless the corporation was doing business *in the sense that is required to subject it to jurisdiction.*" (Emphasis supplied.)

In *Thurman v. Chicago M. & St. P. Ry.*, 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563, Mr. Chief Justice Rugg, in the course of an able and exhaustive review of cases on the subject of state jurisdiction where interstate commerce is involved, said for the court:

> "* * * A foreign corporation may be doing business within a state to such an extent as to be liable to service of process and thus subject to its jurisdiction, and yet not liable to taxation or other undue burdens upon interstate commerce. The distinction between presence of a foreign corporation for service of process because doing business even exclusively interstate in nature, and its absence for purposes of taxation although doing such business, is well established." (Citing cases.)

It is thus apparent from numerous decisions of this Court that, even if it be conceded that the appellant maintains a place of business in the State of California, within the definition contained in Ruling No. 6 of the appellee Board, it by no means follows that the appellees, or the state itself, can by mere *ipse dixit* burden or regulate a foreign corporation whose only business within the state's borders is interstate commerce.

That *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, and *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, are still good law is apparent from recent decisions of this Honorable Court. *Atlantic Lumber Co. v. Commissioner*, 298 U. S. 553, 555; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 82 L. ed. 52, 58, (Footnote No. 3).

POINT III.

The Procedure Prescribed by the State Statute for Enforcement of Its Provisions Is, With Respect to the Appellant, Repugnant to the Due Process Provision of the Fourteenth Amendment of the Federal Constitution.

In the absence of the protection of an injunction against the appellees, the appellant is liable to be proceeded against in accordance with the state law.

Graves v. Texas Co., 298 U. S. 393, 402.

Thus, according to the terms of the statute under which the appellees claim authority to proceed herein, the appellees, under section 10, may make and have made arbitrary determinations of liability against the appellant, based upon estimates, may add penalties, and may depend upon the mail as a means for serving notice of its action. If any amount so determined is not paid the appellee Board may, under section 20 of the act, by merely filing a certificate, cause the entry, by the clerk of any county of the state, of a "special judgment". Upon recordation of an abstract or copy of such judgment the amount thereof constitutes a lien upon any real property of the appellant in the county where such recordation is made. Execution shall issue upon such a judgment, upon request of the Board, in the same manner as execution may issue upon other judgments, and sales may be held under such execution.

Other provisions of section 20 of the act purport to sanction the tying-up of a delinquent's accounts and personal property, the seizure and sale of real and personal property, and the leaving at the place of sale, at the risk of the delinquent, of the unsold portion of any property so seized.

Section 24 provides that, in any action brought under the provisions of the act, process may be served according to the provisions of the codes of the state, or may be served upon any agent or clerk of this state employed by any retailer in a place of business maintained by such retailer in the state, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office. When that provision is combined with the definition of maintenance of a place of business, contained in Ruling No. 6 of the appellee Board [R. 14], it appears that the attempted jurisdiction of California over nonresident retailers is virtually without limit.

We think that it may be said of this statute, as it was said of the statute involved in *Truax v. Corrigan*, 257 U. S. 312, at p. 328:

> "A law which operates to make lawful such a wrong as is described in the plaintiff's complaint deprives" (the plaintiff) "of his property without due process, and cannot be held valid under the Fourteenth Amendment."

Corporations are persons within the meaning of the Fourteenth Amendment forbidding the deprivation of property without due process of law.

Connecticut General etc. Co. v. Johnson, 303 U. S. 77.

In the recent case of *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.*, 95 Cal. Dec. 442, 79 Pac. (2d) 380, the Supreme Court of California branded as a denial of due process the compelling of one person to pay the debt of another. The provision of the California Retail Sales Act of 1933, Stat. 1933, p. 2600, there held unconstitutional, purported to authorize the retailer of tangible personal property to pass on to the purchaser thereof the tax imposed on the retailer for the privilege of selling such property.

It is no less a violation of the Fourteenth Amendment to provide by section 6 of the Use Tax Act that the tax therein required to be collected by the retailer (which is the excise tax imposed by section 3 on storage, use or other consumption, and for which the storer, user or consumer is declared liable) "shall constitute *a debt owed by the retailer to this state*". (Emphasis supplied.)

To assume jurisdiction of a person against his protest where no jurisdiction exists is denial of due process of law.

Thurman v. Chicago etc. Co., 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563, 568.

See, also:

Riverside etc. Mills v. Menefee, 237 U. S. 189;

McDonald v. Mabee, 243 U. S. 90;

Hess v. Pawloski, 274 U. S. 352, 355.

The legislation of a state can only apply to persons and things over which the state has jurisdiction.

Gibson v. Chantreau, 80 U. S. 92, 99.

The legislative and judicial authority of a state is bounded by the territory of that state.

Wilkinson v. Leland, 2 Pet. 627, 655.

"Before a state may compel a corporation of another state to submit to its jurisdiction in any aspect, it must be within the state in some form."

Commonwealth of Penn. v. Sun Oil Co., 294 Pa. 99, 60 A. L. R. 737.

Neither the statute nor the sovereignty of the State of California extends to the appellant.

In re Pressed Steel Car Co. of N. J., 20 Fed. Supp. 1016.

In *Moore v. Mitchell* (C. C. A. 2), 30 Fed. (2d) 600, it was held that a court in New York would not take jurisdiction of an action by the county treasurer of Grant County, Indiana, to recover taxes. The court stated (p. 602) that the tax laws of one state cannot be given extra-territorial effect, so as to make collections through the agency of the courts of another state.

With even greater force it can be stated that the Use Tax Act of California cannot be given extra-territorial effect so as to make collections through the agency of an Illinois corporation whose only business in California is interstate in character.

Conclusion.

For the reasons hereinabove set forth the decree of the court below, dismissing the bill and the application for interlocutory injunction and vacating the temporary restraining order, was erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

CONSTITUTION OF THE UNITED STATES.

Article I, Section 8. The Congress shall have power * * *

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Amendments, Article XIV, Section 1. * * *

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CALIFORNIA.

Article I, Section 13. * * *

No person shall * * * be deprived of life, liberty, or property without due process of law. * * *

28 U. S. C. A., *Section 41. (Judicial Code, Section 24, amended.) Original jurisdiction.* The districts courts shall have original jurisdiction as follows:

(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States,

or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United

States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.

* * * * * * * * *

(14) *Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

28 U. S. C. A. *Section 380.* (Judicial Code, Section 266, amended.)

* * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any

justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.

USE TAX ACT OF 1935.

Chapter 361, Statutes of 1935 as amended; Chapters 401, 671 and 683, Statutes of 1937.

An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately.

The people of the State of California do enact as follows:

Short Title.

SECTION 1. This act is known and may be cited as the "Use Tax Act of 1935."

Definitions.

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

(c) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a purchase.

(d) "Sales price" means the total amount for which tangible personal property is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included, and "sales price" shall not include the amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit or the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(e) "Person" means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(f) "Retailer" means and includes every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales

at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act.

(g) "Board" means the State Board of Equalization.

(h) "Tangible person property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

(i) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(j) "In this State" or "in the State" means within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America.

Levy of Tax; Tax Rate; Receipt for Tax.

Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in

this State at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the board, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

In the event that the excise tax herein imposed should be judicially determined to be a property tax, this act shall be regarded as having been enacted as of June 30, 1935, in the exercise of the power of classification conferred by section 14 of Article XIII of the California Constitution and all taxes, interest and penalties imposed, levied, assessed, accrued or collected hereunder from such date and prior to the adoption of this amendment are hereby legalized and ratified and the assessment, levy, collection and accrual of all taxes, interest and penalties prior to the adoption of this amendment are hereby legalized, ratified and confirmed as fully to all intents and purposes as if this act had been adopted by the vote of two-thirds of all the members elected to each of the two houses of the Legislature. All such taxes,

interest and penalties which had accrued and remained unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to the provisions of this act. Nothing contained herein shall be construed to import illegality to the tax imposed by this act.

Exemptions.

Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(c) Gas, electricity and water, when furnished or delivered to consumers through mains, lines or pipes:

(d) Gold bullion, gold concentrates or gold precipitates, when sold by the producer or refiner thereof for storage, use or other consumption in this State.

(e) Property used for the performance of a contract on public works executed prior to August 1, 1933.

(f) Motor vehicle fuel, the gross receipts received from sales or distributions of which in this State are subject to the tax imposed thereon under the provisions of the "Motor Vehicle Fuel License Tax Act," and not subject to refund.

(g) Food Products Purchased for Human Consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith.

The exemption of food products set forth herein is made subject to the condition that the gross receipts from retail sales of food products be exempted from the computation of the tax imposed by the Retail Sales Tax Act of 1933, and any amendments thereto: provided, however, that should the gross receipts from retail sales of food products not be exempted from the computation of the tax imposed by said act and any amendments thereto, or should the exemption of the gross receipts from sales of food products from the computation of the tax imposed by said act and any amendments thereto be declared unconstitutional or should the exemption of food products set forth herein be declared unconstitutional then the rate of tax set forth in section 3 hereof shall be two per cent on and after July 1, 1935.

Exemption of Vessels.

Sec. 4.7. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act, namely, any ship of more than one thousand

tons burden purchased in this State from the builders thereof, with respect to which this tax would, if such ship had been purchased outside this State or purchased in interstate commerce, be inoperative because prohibited under the Constitution or the laws of the United States of America or the Constitution of this State.

Registration of Retailers.

Sec. 5. Every retailer selling tangible personal property for storage, use or other consumption in this State shall within thirty days after the effective date of this act register with the board and give the name and address of all agents operating in this State, the location of any and all distribution or sales houses or offices or other places of business in this State and such other information as the board may require.

Collection of Tax by Retailers; Tax Receipts.

Sec. 6. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under the provisions of section 4 hereof, shall, at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales.

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this State.

Quarterly Tax Returns and Tax Payments; Presumption That Storage, Use or Other Consumption of Tangible Personal Property Taxable.

Sec. 7. The tax imposed by this act shall be due and payable to the board quarterly on or before the fifteenth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of July, 1935, and ending on the thirtieth day of September, 1935. Every retailer maintaining a place of business in this State shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property sold by the retailer, the storage, use or consumption of which became subject to the tax imposed by this act

during the preceding quarterly period, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the retailer during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by retailers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath.

Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a retailer required or authorized hereunder to collect the tax, shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period and with respect to which the tax was not paid to a retailer required or authorized hereunder to collect the tax, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a retailer required

or authorized hereunder to collect the tax during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

The board, if it deems it necessary to insure the collection of the tax imposed by this act, may provide by rule and regulation for the collection of said tax by the affixing and canceling of revenue stamps and may prescribe the form and method of such affixing and canceling.

For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property by any person for delivery in this State is sold for storage, use or other consumption in this State unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this State by the purchaser thereof was purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State.

Delinquency Penalty; Interest.

Sec. 8. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the board under the provisions of sections 9 and 10 hereof, within the time required by this act shall

pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent thereof, plus interest at the rate of one-half of one per cent per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Additional Determinations.

Sec. 9. If the board is not satisfied with the return and payment of the tax or the amount of tax herein required to be paid to the State by any person, it is hereby authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the board until paid. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent of such amount shall be added thereto. The board shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served per-

sonally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the board.

Arbitrary Determinations.

Sec. 10. If any person neglects or refuses to make a return required to be made by this act, the board shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon any information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the board until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent of the amount required to be paid by such person shall be added thereto in addition to the ten per cent penalty as above provided. Promptly thereafter the board shall give to such person

written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof.

Jeopardy Determinations.

Sec. 11. If the board believes that the collection of any tax or any amount of tax herein required to be collected and paid to the State will be jeopardized by delay, it shall thereupon make a determination of such tax or amount of tax herein required to be collected, noting that fact upon such determination, and the amount thereof shall be immediately due and payable. If the amount specified in the determination is not paid within ten days after the service upon the person against whom the determination is made of notice thereof, such amount becomes final at the expiration of such ten days, unless a petition for redetermination is filed within such ten days, and the delinquency penalty and the interest provided in section 8 hereof shall attach to the amount of the tax or the amount of the tax required to be collected specified therein.

The person against whom a jeopardy determination is made hereunder may petition for the redetermination thereof pursuant to section 12 hereof; provided, however, that such petition for redetermination must be filed with the board within ten days after the service upon such person of notice of the determination; and provided further, that such person must within said ten-day period deposit with the board such security as it may deem necessary to insure compliance with the provisions of this act. Such security may be sold by the board in the manner prescribed by section 14 hereof.

Petition for Redetermination; Hearing; Due Date of Determinations; Delinquency Penalty.

Sec. 12. Any person from whom an amount is determined to be due under the provisions of section 9 or 10 hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty day period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty day period, the board shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person an oral hearing and shall give such person ten days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The order or decision of the board upon a petition for redetermination shall become final thirty days after service upon such person of notice thereof.

All amounts determined to be due by the board under the provisions of section 9 or 10 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent of the amount determined to be due.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof.

Extension of Time for Filing Returns.

Sec. 13. * * *.

Security for Payment of Tax.

Sec. 14. The board, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject thereto to deposit with it such security as the board may determine. The same may be sold by the board at public auction if it becomes necessary so to do in order to recover any tax, or any amount herein required to be collected, interest or penalty due. Notice of such sale may be served upon the person who deposited such security personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the person at his address as the same appears in the records of the board. Upon any such sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the security.

Limitation of Time for Making Additional Determinations.

Sec. 15. * * *.

Interest on Delinquent Payments.

Sec. 16. All taxes or amounts herein required to be collected not paid to the board on the date when the same became due and payable shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

Overpayments; Refunds.

Sec. 17. If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, from whom it was collected, or by whom paid to the board, and if approved by the State Board of Control the same shall be credited on any amounts then due from such person under this act or the California Retail Sales Tax Act of 1933, and the balance shall be refunded to such person, or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the date of overpayment. Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Interest shall be allowed and paid upon any overpayment of any amount of tax, if the overpayment was not made because of an error or mistake on the part of the person making such overpayment, at the rate of six per centum per annum as follows:

(1) In the case of a credit, from the date of the overpayment to the date of the allowance of the credit. Any interest allowed on any credit shall first be credited on any amounts due from the person to whom the credit is given under this act or the California Retail Sales Tax Act of 1933.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund

warrant by not more than thirty days, such date to be determined by the board.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California and such action shall be tried in the county of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that any amount has been illegally determined to be due from any person the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of such amount upon the records of the board.

Fraud or Evasion of Tax.

Sec. 18. If fraud or evasion on the part of any person is discovered by the board, it shall determine the amount by which the State has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case

may be, for which such amounts should have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in section 8 hereof shall attach thereto.

Report of Board to Controller.

Sec. 19. The board shall report to the Controller the amount of collections under this act and he shall keep a record thereof.

Collection Procedure; Lien of Tax.

Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county

clerk in a loose-leaf book entitled, "Special Judgments for State Retail Sales or Use Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount herein required to be paid, together with interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer or other person liable for the tax, interest or penalty in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount

of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person

in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to

the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

Records; Administration of Act by Board.

Sec. 21. Every retailer and every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall keep such records, receipts, invoices and other pertinent papers in such form as the board may require.

The board or any person authorized in writing by it is hereby authorized to examine the books, papers, records and equipment of any person selling tangible personal property and any person liable for the tax imposed by this act and to investigate the character of

the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount required to be paid hereunder.

The board is hereby charged with the enforcement of the provisions of this act and is hereby authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of this act and to employ such accountants, auditors, investigators, assistants and clerks as may be determined to be necessary for the efficient administration of this act and may designate representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this act or other laws of this State upon the board.

The board may prescribe the extent, if any, to which any ruling or regulation relating to this act shall be applied without retroactive effect.

Information Confidential.

Sec. 22. It shall be unlawful for the board, or any person having an administrative duty under this act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or

copy thereof of any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the Governor may authorize examination of such returns by other State officers, by tax officers of another State, or the Federal Government, if a reciprocal arrangement exists, and any other persons the Governor may so authorize.

Any violation of the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Disposition of Proceeds.

Sec. 23. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund. The moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State.

Suit to Enforce Payment.

Sec. 24. At any time within three years after any amount herein required to be collected has become due and payable and any time within three years after the delinquency of any tax, the board may bring an action in the courts of this State, any other State or in any court of the United States in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest. The Attorney General must prosecute such action. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the amount due hereunder, of the delinquency and of the compliance by the board with all the provisions of this act in relation to the computation and determination of such amount.

In any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office.

Payment Under Protest; Suit for Refund.

Sec. 25. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall

be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount.

Penalty for Failure to Make Return or for Making False or Fraudulent Return.

Sec. 26. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall

be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Penalty for Violation of Act.

Sec. 27. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such.

Constitutionality.

Sec. 28. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional.

* * * * * * * * *

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. 302

FELT AND TARRANT MANUFACTURING COMPANY, a corporation,
Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, and HARRY B. RILEY, as members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Appellees.

BRIEF OF APPELLEES

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65216 CALIFORNIA STATE PRINTING OFFICE

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

(a) Questions Involved

Appellees object to the appellant's statement of the questions involved herein on the ground that the statement embodies conclusions of law, namely, the conclusions that appellant is not subject to the state's jurisdiction and that appellant is required to

pay a tax to the state. Appellees would state the basic issue as follows:

> Can the state constitutionally require a foreign corporation, engaged in interstate commerce within its boundaries, to collect from its purchasers a tax imposed upon such purchasers with respect to the storage, use or other consumption in the state of tangible personal property upon the termination of the interstate transit of the property and to remit to the state the amount collected?

(b) Appellant's Operations

In addition to the appellant's statement of its operations, appellees wish to direct the court's attention to the following matters set forth in the Bill of Complaint:

(1) Appellant employs two general agents in the State of California who devote their entire time to its business affairs. (R. 4, 26.)

(2) Appellant leases two offices in the state, paying the rentals thereof, for the conduct of business on its behalf by its agents, such offices being the headquarters of the agents and their subagents for the conduct of that business. (R. 5.)

(3) Appellant compensates its general agents through the payment of commissions and contributes certain amounts toward the expenses of the general agents and subagents and the salaries of demonstrators. (R. 5, 24, 25.)

(4) "In some instances the machines are shipped directly to the customers, while in other instances, in order to secure reduced freight rates, large groups of machines are shipped to the general agents who make delivery to the various purchasers." (R. 5.)

(5) Appellant supplies machines to its general agents in California for use as demonstrators, samples, repair loans, trials and such other uses as may be authorized from time to time by it. (R. 6, 26.)

ARGUMENT

I

The State Can Constitutionally Require the Appellant to Collect the Tax From Its Purchasers and to Remit the Amount Collected to the State.

It should be observed at the outset that the California Use Tax Act imposes a tax upon consumers of tangible personal property with respect to their storage, use or other consumption of the property and does not impose a tax upon the seller of the property. Section 3 of the act provides as follows:

> "SEC. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State at the rate of three per cent of the sales price of such property.
>
> "Every person storing, using or otherwise consuming in this State tangible personal prop-

erty purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the board, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

Pursuant to the act, the tax is administered by the State Board of Equalization as a tax upon consumers and not upon sellers. Thus, the board's Use Tax Ruling No. 4 provides as follows:

"PAYMENT OF TAX BY PURCHASERS

"Purchasers of tangible personal property, the storage, use or other consumption of which is subject to the tax, must pay the tax:

"(1) to the person from whom such property is purchased if such person holds a permit to engage in business as a retailer under the California Retail Sales Tax Act or a certificate of authority to collect tax under the California Use Tax Act; or

"(2) directly to the board if the person from whom the tangible personal property is purchased does not hold a permit to en-

gage in business as a retailer under the California Retail Sales Tax Act or a certificate of authority to collect tax under the California Use Tax Act.

"Purchasers should not pay the tax to a person who does not hold a retailer's permit or a certificate of authority to collect tax. Purchasers will be liable for payment of the tax to the board unless receipts, as provided in Ruling No. 7, are obtained from sellers holding a retailer's permit or a certificate of authority to collect tax as provided above."

Use Tax Ruling No. 7, referred to in the ruling just quoted, provides as follows:

"RECEIPTS FOR PAYMENT OF TAX TO RETAILERS

"Each retailer required or authorized to collect use tax from purchasers must give a receipt to each purchaser for the amount of tax collected. The receipt need not be in any particular form but must show the following:

"(1) The name and place of business of the retailer.

"(2) The serial number of the retailer's permit to engage in business as a retailer or the serial number of the retailer's certificate of authority to collect use tax.

"(3) The name and address of the purchaser.

"(4) A description identifying the property sold to the purchaser.

"(5) The date on which the property was sold.

"(6) The sale price of the property.

"(7) The amount of tax collected by the retailer from the purchaser.

"A sales invoice containing the data required above, together with evidence of payment of such sales invoice, will constitute a receipt.

"Purchasers will be liable for payment of the tax to the board unless they obtain and retain for inspection receipts as herein provided."

It is clear, therefore, that the status of the appellant under the Use Tax Act is not that of a taxpayer, but merely that of a collecting agent.

It should also be observed that the validity of the tax imposed by the act upon consumers is not questioned herein. Appellant does not dispute the right of appellees to collect the tax from the consumer. (Brief of Appellant, p. 17.) In any event, that right seems clearly established by the decision of this court in *Henneford* vs. *Silas Mason Co.,* 300 U. S. 577.

The authority of the state to require the appellant to collect the use tax from its purchasers and remit the amount collected to the state is clearly established by the decision of this court in *Monamotor Oil Co.* vs. *Johnson,* 292 U. S. 86. That case involved an Iowa statute requiring all distributors to collect a tax on the use of gasoline within the state. The court rejected the contention that this requirement constituted a forbidden burden with respect to gasoline which had been shipped into

the state in interstate commerce. In the course of its opinion, at page 93, the court stated:

"There is no substance in the claim that the statutes impose a burden upon interstate commerce, contrary to the prohibition of Article I, § 8 of the Federal Constitution. The appellant insists that the tax is a direct tax on motor vehicle fuel imported. The court below concluded that the law laid an excise upon the use of fuel for the propulsion of vehicles on the highways of the state. The state officials have administered the tax on this theory. We think this the correct view. The levy is not on property but upon a specified use of property. *Altitude Oil Co.* v. *People,* 70 Colo. 452; 202 Pac. 180; *Standard Oil Co.* v. *Brodie,* 153 Ark. 114; 293 S. W. 753. It is not laid upon the importer for the privilege of importing (compare *Brown* v. *Maryland,* 12 Wheat. 419; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 647), but falls on the local use after interstate commerce has ended. Compare *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506; *Nashville, C. & St. L. Ry. Co.* v. *Wallace,* 288 U. S. 249; *Edelman* v. *Boeing Air Transport, Inc.,* 289 U. S. 249. The statute in terms imposes the tax on motor vehicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. *Citizens National Bank* v. *Kentucky,* 217 U. S. 443, 454; *Pierce Oil Corp.* v. *Hopkins,* 264 U. S. 137; *Standard Oil Co.* v. *Brodie, supra; Standard Oil Co.* v. *Jones,* 48 S. D. 482; 205 N. W. 72."

Having determined that the tax was a valid charge upon the use of gasoline within the state and that the state could constitutionally require the sellers of gasoline to collect that tax from their purchasers, the court held that this requirement could be enforced even though the gasoline with respect to which the tax was imposed was shipped into the state in interstate commerce. In this connection, at page 94, the court said:

> "The appellant, however, says that the state officials have required it to report and to pay tax on shipments made from Oklahoma direct to dealers in Iowa who are appellant's customers, and that in respect of such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to the tax. If it is not so used by the appellant's customer, or by the purchaser at retail, either may obtain a refund of the tax collected by the appellant and remitted to the state. The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

There is ample precedent for the imposition of the duty to collect a tax upon one who was con-

stitutionally exempt from the tax. See, in this connection, the cases holding that a state may require a national bank to collect a tax on shareholders which could not have been imposed upon the bank.

National Bank vs. *Commonwealth,* 9 Wall. (76 U. S.) 353;
Aberdeen Bank vs. *Chehalis County,* 166 U. S. 440;
Merchants' and Manufacturers' Bank vs. *Penn,* 167 U. S. 461;
Home Savings Bank vs. *Des Moines,* 205 U. S. 503.

See also *Pierce Oil Co.* vs. *Hopkins County,* 264 U. S. 137, holding that a state statute requiring sellers of gasoline to collect a tax from their purchasers did not violate due process; and

Iowa vs. *Standard Oil Co.,* ---- Iowa ----, 271 N. W. 185;
Iowa vs. *Phillips Petroleum Co.,* ---- Iowa ---, 271 N. W. 192.

(Appeal dismissed for want of substantial Federal question, 302 U. S. 646; involving the same statute under consideration in the *Monamotor* case)

Appellant attempts to distinguish the *Monamotor* case on the ground that the seller in that case was engaged in both intrastate and interstate commerce, whereas appellant is engaged solely in interstate commerce. Assuming, for the purpose of argument, that the appellant is engaged exclusively

in interstate commerce it is difficult to see why the rule of the *Monamotor* case should be any the less applicable. Certainly, the burden assertedly imposed on interstate commerce is no greater in one case than in the other and, accordingly, if there is no prohibited burden in the one case, there is none in the other. Thus, the obligation imposed upon the appellant to collect the tax with respect to its interstate shipments of tangible personal property is no greater than the obligation imposed upon the Monamotor Oil Company to collect a tax with respect to its interstate shipments of gasoline. The fact that the Monamotor Oil Company transacted some intrastate business in Iowa is just as irrelevant, so far as the commerce clause is concerned, as would be the fact that it transacted intrastate business in some other state. It is clear, therefore, that if the requirement that appellant collect the tax be invalid, it can not be so because of the commerce clause.

It is equally clear, however, that this requirement does not violate the Fourteenth Amendment. There can be no doubt about appellant's being within the jurisdiction of the state as the service of process cases so convincingly demonstrate. Thus, in *International Harvester Company of America* vs. *Kentucky*, 234 U. S. 579, at page 585 the court said:

> "Here was a continuous course of business in the solicitation of orders which were sent to another State and in response to which the

machines of the Harvester Company were delivered within the State of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the State in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the State."

So, also, the course of conduct of appellant's authorized agents within the state, as set forth at the opening of this brief, constituted a doing of business there in such wise that appellant might be fairly said to have been there, doing business and amenable to the process of the courts of the state.

At page 587 of its opinion in the *International Harvester* case, the court said:

"It is argued that a corporation engaged in purely interstate commerce within a State cannot be required to submit to regulations such as designating an agent upon whom process may be served as a condition of doing such business, and that as such requirement cannot be made the ordinary agents of the corporation, although doing interstate business within the State, can-

not by its laws be made amenable to judicial process within the State. The contention comes to this, so long as a foreign corporation engages in interstate commerce only it is immune from the service of process under the laws of the State in which it is carrying on such business. This is indeed, as was said by the Court of Appeals of Kentucky, a novel proposition, and we are unable to find a decision to support it, nor has one been called to our attention.

"True, it has been held time and again that a State cannot burden interstate commerce or pass laws which amount to the regulation of such commerce; but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the State which is wholly of an interstate commerce character. Such corporations are within the State, receiving the protection of its laws, and may, and often do, have large properties located within the State. In *Davis* v. *Cleveland, C., C. & St. L. Ry.*, 217 U. S. 157, this court held that cars engaged in interstate commerce and credits due for interstate transportation are not immune from seizure under the laws of the State regulating garnishment and attachment because of their connection with interstate commerce, and it was recognized that the States may pass laws enforcing the rights of citizens which affect interstate commerce but fall short of regulating such commerce in the sense in which the Constitution gives sole jurisdiction to Congress, citing *Sherlock* v. *Alling*, 93 U. S. 99, 103; *Johnson* v. *Chicago & Pacific Elevator Co.*, 119

U. S. 388; *Kidd* v. *Pearson,* 128 U. S. 1, 23; *Pennsylvania R. R. Co.* v. *Hughes,* 191 U. S. 477; and *The Winnebago,* 205 U. S. 354, 362, in which this court sustained a lien under the laws of Michigan on a vessel designed to be used in both foreign and domestic trade."

In *Natural Gas Pipeline Company Co. of America* vs. *Slattery,* 302 U. S. 300, the court held that an Illinois statute giving the State Commerce Commission the right to require information from affiliated interests of public utilities was not unconstitutional as respects a foreign corporation engaged exclusively in interstate commerce. In the course of its opinion, at page 306, the court said:

"We can find in the commerce clause and the Fourteenth Amendment no basis for saying that any person is immune from giving information appropriate to a legislative or judicial inquiry. A foreign corporation engaged exclusively in interstate commerce within the state is amenable to process there as are citizens and corporations engaged in local business. *International Harvester Company* v. *Kentucky,* 234 U. S. 579. It is similarly subject to garnishment and writ of attachment. *Davis* v. *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.,* 217 U. S. 157. It can be deemed to be no less subject, on command of a state tribunal, to the duty to give information appropriate to an inquiry pending there. The present investigation is not a regulation of interstate commerce and it burdens the commerce no more than the obligation owed by

all, even those engaged in interstate commerce, to comply with local laws and ordinances, which do not impede the free flow of commerce, where Congress has not acted."

Likewise the requirement in issue in this case does not "impede the free flow of commerce." *Monamotor Oil Co.* vs. *Johnson, supra.*

II

Appellant Is Not Entitled to an Injunction Restraining Appellees From Enforcing the Provisions of the Use Tax Act Against It

The exact nature of the argument appearing under Point III of appellant's brief, pages 34-37, is not entirely clear. In view of the citation of *Graves* vs. *Texas Co.,* 298 U. S. 393, and *Truax* vs. *Corrigan,* 257 U. S. 312, appellees believe that appellant is seeking to establish thereunder merely that appellant is entitled to an injunction as a matter of remedy, if it be determined by the court that the state is without authority to require it to collect the tax from its purchasers and remit the amount collected to the state. Appellees do not question herein the availability to appellant of the remedy of injunction, if its position as to the invalidity of the Use Tax Act as applied to it be found correct.

The case of *National Ice & Cold Storage Co.* vs. *Pacific Fruit Express Co.,* 95 Cal. Dec. 442, 79 Pac. (2d) 380, cited at page 36 of appellant's brief offers no support to appellant. In that case, the court merely determined that the state was without au-

thority to require a purchaser to reimburse his seller for the amount of retail sales tax which the seller was required to pay to the state with respect to sales made after the effective date of the Retail Sales Tax Act pursuant to contracts executed before that date which did not provide for the payment of such reimbursement. The court's conclusion was based upon the fact that the retail sales tax was imposed upon the seller and not upon the purchaser, a matter which distinguishes that case from the one at bar, the use tax being imposed directly upon the purchaser.

The remaining cases cited under Point III by appellant relate merely to the question of the jurisdiction of the state over the appellant, a matter already discussed by appellees herein and further discussion of which is believed to be unnecessary.

Appellant lists the various administrative provisions for the enforcement of the Use Tax Act, but the propriety of these provisions as applied to a person within the jurisdiction of the state is not questioned by appellant. Unless, accordingly, this court determine that the state is without authority to require appellant to collect the tax and remit the amount collected to the state or that appellant is without the jurisdiction of the state, there is no occasion to pass upon the propriety of these provisions.

CONCLUSION

For the reasons hereinabove set forth the decree of the court below, dismissing the bill and the application for interlocutory injunction and vacating the temporary restraining order, was proper and should be affirmed.

Respectfully submitted.

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H. H. LINNEY,
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Deputy Attorney General,
Attorneys for Appellees.

ROGER J. TRAYNOR,
of Counsel.

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

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Amicus Curiae in Support of Appellant.

Subject Index

Table of Authorities Cited

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BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

I.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the District Court of the United States for the Southern District of California, Central Division, from the decree of which Court this appeal is taken, is reported in 23 F. Supp. 186.

II.

JURISDICTION.

Probable jurisdiction was noted by this Court on October 10, 1938.

III.

STATEMENT OF THE CASE.

(a) Position of Amicus Curiae.

With the consent of counsel for appellant and appellees, and by leave of this Honorable Court, this brief is filed in support of the appeal of appellant from the decree of the District Court of the United States for the Southern District of California, Central Division, dismissing the bill filed by appellant in that Court. By said bill, appellant sought an injunction prohibiting the enforcement against appellant of the California Use Tax Act of 1935 (Cal. Stats. 1935, c. 361, as amended by Cal. Stats. 1937, cc. 401, 671 and 683), as construed and applied by appellees, upon the ground that said statute as so construed and applied constitutes a violation of Article I, Section 8, clause 3, of the Constitution of the United States, and of Sec-

tion 1 of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 13 of the Constitution of the State of California.

We have read the brief of appellant filed with this Honorable Court in support of its appeal, and concur in the views expressed therein. However, inasmuch as this case is one of great importance to all manufacturers and merchants throughout the United States and abroad who are engaged in selling merchandise in interstate commerce to California consumers, we beg leave to add our views to those expressed by the appellant. We are attorneys for Advertising Specialty National Association, Washington, D. C., the members of which association are engaged in making sales of tangible personal property in interstate commerce to purchasers for use in the State of California. One or more of these members although not engaged in doing business in the State of California, not qualified to do an intra-state business therein, and not subject to the jurisdiction of the State of California to tax, have had arbitrary assessments levied against them by appellees under the California Use Tax Act of 1935.

(b) Case One of First Impression.

So far as we have been able to ascertain, this case is one of first impression, involving as it does an attempt on the part of one State to assess a tax, directly or indirectly, against a vendor not subject to its jurisdiction to tax, where the tax attempted to be imposed against the foreign vendor is actually levied, according to the statute, upon the exercise of the privilege of use or storage of tangible personal property within the

taxing State by the purchaser, an entirely different party. We are, of course, familiar with the decision of this Honorable Court in *Henneford v. Silas Mason Co.*, 300 U.S. 577. That case involved the constitutionality of the Compensating Tax provisions of the Revenue Act of the State of Washington. (Wash. Stats. 1935, c. 180, tit. IV.) The Washington tax is levied upon the privilege of use or storage of chattels in that State. It is levied solely against the purchaser, no attempt being made either directly or indirectly to impose it on the vendor, whether domesticated or doing business in the State of Washington, or beyond its jurisdiction. We do not question the right of the State of Washington or of the State of California to levy a tax upon the privilege of use or storage as against the purchaser exercising the privilege when the chattel used or stored has ceased to be in transit. We do, however, seriously question the power of the State of California, or any other State, to levy such a tax against a vendor who is neither domesticated nor doing business in the taxing State, whether it be imposed directly or be imposed indirectly through the guise of imposing a personal liability on him for "a debt owed * * * to this State" in the amount of the tax which is "required to be collected" by him whether or not he is able to collect it.

As we have stated, we do not raise any question concerning the constitutionality of the California Use Tax Act of 1935, as amended, in so far as it imposes a tax upon the storage, use or other consumption of tangible personal property in the State of California, nor in so far as it provides that every person storing, using or

otherwise consuming such property in the State of California shall be liable for the tax imposed by that Act. We raise no question as to whether that tax is a direct property tax or an excise tax upon the privilege of use in the State of California. We must admit the propriety of the language of the late Mr. Justice Cardozo in *Henneford v. Silas Mason Co.*, 300 U.S. 577, at page 583:

> "A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

(c) Real Question Involved.

The question involved in the instant proceeding, however, goes far beyond the ruling of this Honorable Court in the *Silas Mason Co.* case. We submit that this question is:

Has the State of California the power to create a debt owing to it by a vendor who sells tangible personal property in interstate commerce to purchasers for storage, use or other consumption in the State of California in an amount equal to a tax levied on the purchaser for the privilege of use, storage or other consumption within that State, where the vendor is not engaged in doing business and has transacted no intra-state business in California, has not qualified so to do and is not subject to the taxing jurisdiction of that State?

It is believed that to merely state the question is to require an answer in the negative. It is submitted

that the State of California has not the power to impose any tax upon the foreign vendor measured by the value of the tangible personal property sold by such vendor in interstate commerce and based upon its subsequent storage, use or other consumption in the State of California by the purchaser; nor has the State of California the power indirectly so to tax the foreign vendor by providing that the tax levied against the purchaser in interstate commerce shall constitute a debt owed by such foreign vendor to the State upon the ground that it can impose a duty on such foreign vendor to collect a like amount from the purchaser.

IV.

ARGUMENT.

(a) Opinion of Court Below.

The Court below apparently gave no consideration to this question or to the fact that so to attempt to tax a foreign vendor is beyond the power of the State. It first decided that the California Use Tax Act of 1935 "in so far as it imposes a Use Tax on personal property after the same has been brought into the State, does not violate either the Commerce Clause or the Fourteenth Amendment of the Federal Constitution" upon the authority of *Henneford v. Silas Mason Co.*, 300 U.S. 577, *Monamotor Oil Co. v. Johnson*, 292 U.S. 86, and *Bowman v. Continental Oil Co.*, 256 U.S. 642. It then stated:

> "Accordingly, there remains for consideration only the question whether the state may require the seller to collect such tax and in connection

therewith require the latter to conform to certain regulations in order to insure the collection of the tax.

We think this question must be answered in the affirmative. In this respect, we are unable to distinguish the statute here involved from the one upheld in the case of Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S.Ct. 575, 78 L. Ed. 1141. Nor are we able to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute. The allegations of the bill respecting this phase of the case fully warrant the conclusion that plaintiff's method of doing business includes maintaining at least two places of business in California." (Page 191.)

The Court commented not on whether the appellant was subject to the jurisdiction of the State of California nor on the fact that it was a foreign corporation engaged solely in selling goods in interstate commerce and not qualified to transact intra-state business in the State of California, and which had not transacted such business as would subject it to the State's jurisdiction. It commented not on the fact that the tax which it had just held valid "in so far as it imposes a use tax upon personal property *after* the same has been *brought* into the state" and thus which only attaches after the title and possession has passed from the foreign vendor and after the interstate commerce has terminated, was to be now imposed against the foreign vendor with no interest in the property through the guise of making him liable to the State for a debt in the amount of the tax thereafter due from the purchaser when the latter

exercises the privilege that is taxed. The Court below merely considered itself bound by the decision of this Honorable Court in *Monamotor Oil Co. v. Johnson*, 292 U.S. 86. No such question of due process, of jurisdiction to tax, or of burden on interstate commerce was involved in that case.

(b) Case of Monamotor Oil Co. v. Johnson, 292 U.S. 86.

The Monamotor Oil Co., an Arizona corporation, was engaged in doing an intra-state business in the State of Iowa. The Iowa tax in question was one levied on all motor vehicle fuel used in that State. Although the tax was levied on the person using the fuel in Iowa, distributors such as the Monamotor Oil Co. who engaged in business in that State were required to pay the tax in advance for the privilege of selling and dispensing gasoline in Iowa. We quote from the opinion of the United States District Court, Southern District of Iowa, in that case below (3 F. Supp., 189 at page 199):

> "A distributor of gasoline has no inherent rights to sell and dispense gasoline in the state of Iowa and, on account of the nature of the product that he handles, the state has a right to require of him *in consideration of his right to dispense gasoline within the state* the administrative acts as provided by the statutes." (Italics supplied.)

(And see the brief of appellant herein, pages 17-20.)

The Monamotor Oil Co. was subject to the taxing powers of the State of Iowa. The tax levied could have been imposed in the first instance on the Monamotor Oil Co. whether it be a property tax, a sales tax or a

use tax. The property involved in that case had come to rest. No attempt was made by the State of Iowa to impose a tax upon a corporation not qualified to do business within the State and actually not engaged in doing business within the State.

This Honorable Court grounded its opinion in the *Monamotor Oil Co.* case upon its previous decisions in *Citizens National Bank v. Kentucky,* 217 U.S. 443 and in *Pierce Oil Corporation v. Hopkins,* 264 U.S. 137, and upon the decisions of the Supreme Courts of South Dakota and Arkansas in the cases of *Standard Oil Co. v. Jones,* 48 S.D. 482, 205 N.W. 72, and *Standard Oil Co. v. Brodie,* 153 Ark. 114, 239 S.W. 753, respectively. In each case the corporation objecting to the tax involved was actually engaged in doing an intra-state business within the jurisdiction of the State levying the tax. The *Citizens National Bank* case involved a Kentucky statute to back-assess the shares of stock in that bank located in Kentucky. The *Pierce Oil Corporation* case involved an Arkansas statute providing "that one who sells gasoline to be used by the purchaser in motor vehicles on highways of the State 'shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1¢) per gallon for each gallon so sold'." The claim was made that the act violated the due process clause. The Court stated at page 139:

> "A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a state which has, under its constitution, power to regulate the business of selling gasoline (*and doubtless, also,*

> *the power to tax the privilege of carrying on that business*), is not prevented by the due process clause from imposing the incidental burden." (Italics supplied.)

The Supreme Court of South Dakota, in passing on a similar gasoline license tax act of that State (*Standard Oil Co. v. Jones*, 48 S.D. 482, 205 N.W. 72, supra) stated:

> "Probably there is no more reason why an importer should pay the costs of collecting a consumer's tax than any other citizen, but if a fund is necessary *it may be collected from all or any class of citizen* provided it falls equally upon all of a given class." (Italics supplied.)

In passing upon the like Arkansas statute in *Standard Oil Co. v. Brodie*, 153 Ark. 114, 239 S.W. 753, the Court grounded the jurisdiction of the State to compel the distributor to collect the tax upon the inherent jurisdiction of the State over the distributor corporation:

> "It is next contended that the due process clause of the Constitution of this State and of the United States is violated by the requirement laid upon the dealers in gasoline to collect and pay the tax. It must be remembered that the tax is not laid on the sale of the gasoline, nor upon the business of the dealer. The dealer is not required to pay the tax, but to collect it, keep and present an account thereof, and pay it over to the county treasurer. The purpose of the statute is twofold, namely, to impose a tax upon the purchaser of gasoline for the use of the car, and to regulate the business of the dealer by requiring him to collect the tax and

pay it over to the county treasurer. *It is certainly within the power of the Legislature to regulate the business of selling gasoline,* and it is not an unreasonable regulation, for it does not involve the payment of any fee, nor the performance of any unreasonable task." (Italics supplied.)

In these cases the validity of imposing on the distributor the tax or the duty of pre-paying a tax which was to be borne by the purchaser, was based on the fact that the distributor in each instance was subject to the jurisdiction of the State to tax, doing business within the State. Did the State of California have the power to so tax Felt and Tarrant Manufacturing Co., or the thousands of other firms not engaged in doing an intra-state business in California and not qualified so to do, upon the interstate sale of tangible personal property to be stored, used or otherwise consumed by a purchaser within this State? We submit that it had no such power, even by indirection. (*Sonneborn Bros. v. Keeling,* 262 U.S. 506, 515.)

(c) Typical cases of Interstate Commerce.

May we suggest that if one compares the most common and simplest case of interstate commerce with the method adopted by appellant Felt and Tarrant Manufacturing Co. one may more readily realize the fact that the California Use Tax Act of 1935 is invalid in its application to the appellant and to all vendors not engaged in doing business in California and who are not subject to the jurisdiction of California for taxation.

Let us first present the cases:

Case No. 1. The X Company, incorporated in the State of New York, has all of its property in that State. It has neither merchandise nor a bank account in California. It has no salesmen, doing strictly a mail-order business. The customer, in the State of California, mails an order to the X Company at New York. The order is accepted at its office in New York. The merchandise manufactured there is mailed or otherwise shipped f.o.b. plant of manufacture from New York to the customer in the State of California direct, the latter in turn remitting by mail direct to New York. We believe that it would be admitted that Sections 6 and 7 of the California Use Tax Act were not intended to and could not apply to this transaction and that such tax as might subsequently be levied upon the use of the property in the State of California could not constitute a debt owed by the X Company to the State of California. Section 5 of the Act, however, even attempts to require that the X Company register with the appellee Board "and give the name and address of all agents operating in this State, the location of any and all distribution or sales houses or offices or other places of business in this State, and such other information as the Board may require." Section 21 also would require the X Company to "keep such records, receipts, invoices and other pertinent papers in such form as the Board may require", the Board being "authorized to examine the books, papers, records and equipment * * *" and to investigate the character of the business of the X Company. Failure to comply

with any of these provisions constitutes a misdemeanor. We would state in passing that we believe the requirements of these sections to be unconstitutional in imposing a tremendous and unreasonable burden on strictly interstate commerce. These provisions, by their terms, are to be applied to all vendors selling chattels in interstate commerce for storage, use or other consumption in California, whether or not the vendor is doing business in California or is in any other way subject to the jurisdiction of the State of California.

Case No. 2. Let us next consider a method of doing business identical in every respect with that involved in Case No. 1, except that the Y Company in this instance has salesmen who travel through the State of California soliciting orders which are mailed by them rather than by the customer direct to the Y Company in New York. The method of shipping the merchandise and making remittance is likewise identical with that set forth in Case No. 1. We believe that the holding in this case would necessarily be identical with the holding in Case No. 1, and that Sections 6 and 7 of the California Use Tax Act would not apply. Certainly, in neither of these cases would the X Company or the Y Company be required to qualify as a foreign corporation in the State of California, nor could either of them be subjected to a franchise or other excise tax levied by the State of California on corporations doing business therein.

Case No. 3. Let us now suppose that the Z Company does business in the identical manner adopted by the

Y Company in Case No. 2, except that the Z Company rents an office in the State of California for the use of its salesmen. The office is not used as a salesroom, no merchandise is stored or exhibited there, it being used solely for the convenience of its salesmen in the receipt of mail and in the preparation and dispatch of orders by mail. Can this single fact permit the State of California arbitrarily to impose on the Z Company the duty of collecting the tax levied pursuant to the Use Tax Act of 1935, as amended, and this at its peril, —"The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this State." We would submit that any attempt to impose the obligations of the California Use Tax Act upon the Z Company engaged in business in the manner just outlined, and particularly the obligation of guaranteeing and pre-paying a tax, constitutes an unreasonable deprivation of property without due process of law as well as an interference with and unreasonable burden on interstate commerce. In the first place, the Z Company is not subject to the jurisdiction of the State of California. In the second place, the Z Company has not done any act whatsoever which is not directly connected with interstate commerce. The State of California can not levy any direct taxes on the Z Company, whether measured by or arising out of its business or otherwise, in view of the fact that it is not subject to the jurisdiction of the State to tax and interstate commerce alone is involved. It is submitted that the State cannot under the guise of attempting to compel it to collect a tax from its customer actually make it guarantee the collection of such tax

and hold it liable in debt for the amount owed by the purchaser to the State, further subjecting it to the numerous penalties, both civil and criminal, contained in the Act.

(d) **Conclusion.**

We do not question the validity of the California Use Tax Act of 1935 in its application to the purchaser. We raise no question of due process where the vendor has qualified to do business in the State of California or where it has by actually engaging in doing business in the State subjected itself to the jurisdiction of the State to tax it. We maintain, however, that any construction of the clause "Every retailer maintaining a place of business in this State", as used in Sections 6 and 7 of the Act, that would include within such terms and subject to the obligations set forth in said Sections a foreign vendor engaged solely in interstate commerce subjecting it to the jurisdiction of the State, is invalid, even though the foreign vendor rents an office in California for the convenience of its salesmen engaged solely in interstate transactions. Any attempt to impose upon such foreign vendor the obligation of a debt in the amount of such tax as may be due from its purchaser merely by reason of the renting of such an office would constitute a deprivation of property without due process of law and a denial of the equal protection of the law. To apply the provisions of Sections 6 and 7 of the California Use Tax Act to such foreign vendor constitutes an attempt on the part of the State of California to reach beyond its jurisdictional limits to tax

an undomesticated foreign corporation, whether it be called a collector, a guarantor or a debtor. We deem it an unreasonable exercise of process to make this foreign vendor a guarantor of the purchaser's tax,—a tax which the vendor may never be able to collect from the purchaser, or to make the vendor a debtor merely because its salesmen avail themselves of the convenience of the use of an office in the State. We have been unable to find any authority with such far-reaching implications. The only pertinent cases which have come to our attention have been grounded on the theory that a person upon whom the task of collection was imposed was subject to the jurisdiction of the State and could have been taxed in the first place. To impose upon the foreign vendor the various obligations and to subject it to the numerous penalties contained in the Act (see Appellant's Brief, pages 5-7, 53-71) will, we submit, not only arbitrarily deprive it of its property without due process of law since it has not voluntarily subjected itself to the jurisdiction of the State to tax (*Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147 and *Sonneborn Bros. v. Keeling*, 262 U.S. 506, 515), but will likewise constitute an unfair and improper burden on interstate commerce. The term "maintaining a place of business", as used in the Act, must mean maintaining such a place of business for the purpose of or using it in connection with the doing or transacting of an intra-state business in the State of California so as to subject the person maintaining the place of business to the jurisdiction of the State of California to tax. We need not cite any authorities

in support of the rule requiring the adoption of such an interpretation as will render the provisions of the sections in question constitutional rather than invalid.

There can be no question but that the entire transaction indulged in by the Z Company, as well as by Felt and Tarrant Manufacturing Co., is one in interstate commerce. To charge the foreign vendor with the various obligations and to subject it to the numerous penalties which may be exacted is to provide that it engages in interstate commerce at its peril if its salesmen avail themselves of an office in the State of California, even though they be engaged solely in interstate commerce. It is submitted that the requirements of these sections and the penalties imposed will seriously burden interstate commerce. The foreign vendor must at its peril make certain that the chattels which it may ship to any purchaser in the State are sold for resale or for use outside of the State, although those facts in many instances may not be determinable until long after the vendor's only connection with the transaction shall have ceased. Then, upon the storage, use or other consumption of the tangible personal property in California, after the interstate commerce has ended, the foreign vendor whose only connection with the transaction was in interstate commerce and whose sole connection even with that phase of the transaction has long since ended, may find itself subjected to a substantial tax under the guise of a debt upon which may be superimposed interest charges and penalties, all of which may be summarily assessed against it, it being in the meanwhile guilty of a misdemeanor. The State

of California has no such extraterritorial jurisdiction as would enable it so unreasonably to burden interstate commerce.

Dated, San Francisco, California,
December 7, 1938,

Respectfully submitted,

JESSE H. STEINHART,
Amicus Curiae in Support of Appellant

Due service and receipt of a copy of the within is hereby admitted

this_____day of December, 1938.

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Attorneys for Appellant.

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Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

No. 302.—October Term, 1938.

Felt and Tarrant Manufacturing Co., Appellant, *vs.* Andrew J. Gallagher, Fred E. Stewart, Richard E. Collins, et al., etc.

Appeal from the District Court of the United States for the Southern District of California.

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

Appellant seeks an injunction prohibiting the state officers from enforcing against it the California Use Tax Act of 1935. (Cal. Stat. 1935, Ch. 361, as amended by Cal. Stat. 1937, Ch. 401, 671 and 683.) Counsel do not question the right of the state to collect this tax from the user, etc., but they say that, in the circumstances here disclosed, the officers may not compel appellant to serve as an agent for collecting the tax as they are threatening to do.

The trial court, three judges, dismissed the bill upon motion.

It appears—

Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union. As stated by the court below its method of doing business with respect to California purchasers is substantially as follows:

"Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ sub-agents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business: also agrees to pay part of the traveling expenses incurred by each general agent, his sub-agents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general

agent to the extent of part of the monies advanced to a sub-agent and, in addition, in the amount of $40.00 per month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to sub-agents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers."

And further "That each of these two general agents maintains an office in this State, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the State. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California."

The Use Tax Act [sec. 6] directs retailers maintaining a place of business in the state, and making sales of tangible personal property for storage, use or other consumption therein, to collect from the purchaser the tax imposed.

Appellant presents for our consideration two points: (1) The statute as construed and applied by the appellees to the appellant is repugnant to Art. I section 8 clause 3 of the Federal Constitution. (2) The threatened enforcement of the statute would deprive appellant of his property without Due Process of Law contrary to the Fourteenth Amendment.

The argument is this—

The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as it transacts in California is interstate in character. California, therefore, lacks the power to require it (1) to act as the state's collecting agent with respect to use tax which may be

come due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collections from the tax debtors, or (3) otherwise to act as a "retailer" as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce prohibited by the Federal Constitution. Numerous provisions of the statute, if applied, would deprive appellant of its proerty without due process of law.

The trial court thought that both contentions were foreclosed by what was said and ruled in *Bowman, et al.* v. *Continental Oil Co.*, 256 U. S. 642, 650, *Monamotor Oil Co.* v. *Johnson, et al.*, 292 U. S. 86, 93, 95, and *Henneford, et al.* v. *Silas Mason Co., et al.*, 300 U. S. 577, 582, 583. And we agree with that conclusion.

Henneford v. *Silas Mason Co.* upheld a Washington statute similar to the one under consideration. The opinion declared (pp. 582, 583)—

"The tax is not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end.

"Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. . . . This is so, indeed, though they are still in the original packages. . . . For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. . . . A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate."

Bowman v. *Continental Oil Company* recognized the right of the state to require a distributor "to render detailed statements of all gasoline received, sold, or used by it, whether in interstate commerce or not, to the end that the State may the more readily enforce said excise tax to the extent that it has lawful power to enforce it as above stated."

Monamotor Oil Co. v. *Johnson* upheld an Iowa statute. The complainant there sought an injunction prohibiting tax officers from requiring the distributor of motor oil received from another state to pay into the state treasury the tax levied upon the consumer. This Court said (pp. 93, 95), "There is no substance in the claim that the statutes impose a burden upon interstate commerce, ... The statute in terms imposes the tax on motor ve-

hicle fuel used or otherwise disposed of in the state. Instead of collecting the tax from the user through its own officers, the state makes the distributor its agent for that purpose. This is a common and entirely lawful arrangement. . . . The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor fuel after it had come to rest in Iowa, and the requirement that the appellant as the shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant."

The challenged judgment must be affirmed.

Mr. Justice ROBERTS took no part in the consideration or decision of this cause.

A true copy.

Test:

Clerk, Supreme Court, U. S.